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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 234

THE UNITED STATES OF AMERICA, PETITIONER

vs.

HENRY PRENTISS & COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JULY 18, 1932

CERTIORARI GRANTED OCTOBER 10, 1932

SUPREME COURT OF THE UNITED STATES

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1 In United States Circuit Court of Appeals for the Second Circuit

HENRY PRENTISS & COMPANY, INC., PLAITIFF-APPELLANT AND appellee

against

THE UNITED STATES OF AMERICA, DEFENDANT-APPELLEE AND appellee

Statement under rule 13

The above-named plaintiff, Henry Prentiss & Company, Inc., commenced this action by the filing of a petition with the clerk of the United States District Court for the Southern District of New York on 16th day of September, 1927, which petition was subsequently served upon the Attorney General by registered mail and personally upon Charles H. Tuttle, United States attorney for the southern district of New York. There has been no change in parties. On the 19th day of October, 1928, issues were joined and the defendant served an answer to the petition which was filed on the 20th day of October, 1928. An amended answer was served on February 25, 1930, and filed on February 26, 1930. The trial was had on February 26, 1930, before Hon. Francis G. Caffey, judge of the United States district court. Judgment was entered on 20th day of February, 1931, in favor of the plaintiff with respect to taxes sought to be recovered for 1920 and in favor of the defendant with respect to taxes sought to be recovered for 1918. On the 13th day of May, 1931, the plaintiff took an appeal, and on May 19, 1931, the defendant took an appeal.

2 In United States District Court for the Southern District of New York

HENRY PRENTISS & COMPANY, INC., PLAINTIFF

against

THE UNITED STATES OF AMERICA, DEFENDANT

Petition

The petition of Henry Prentiss & Company, Inc., respectfully alleges:

1. That the petitioner is a corporation organized and existing under and by virtue of the laws of the State of New York, having its principal office at 149 Broadway, Borough of Manhattan, city, county, and State of New York, southern district of New York.

2. That at all the times hereinafter mentioned the United States of America was and still is a corporation sovereign, and upon information and belief that at all the times hereinafter mentioned William

H. Edwards was collector of internal revenue for the second district of New York, with offices in the Borough of Manhattan, city, county, and State of New York; that the said William H. Edwards is not at the date of the filing of this petition in the office as collector of internal revenue.

3 3. That petitioner duly filed with William H. Edwards, collector of internal revenue for the second district of New York, on June 16, 1919, income and excess-profits and war-profits tax return for the year ended December 31, 1918, pursuant to the provisions of the revenue act of 1918, and thereafter paid to the said collector of internal revenue for and on behalf of the defendant herein the sum of $645,556.75, as income and excess-profits and war-profits taxes for said year 1918.

4. That petitioner duly filed with said William H. Edwards, collector of Internal revenue for the second district of New York, on or about March 15, 1920, income and excess-profits and war-profits tax return for the year ended December 31, 1919, pursuant to the provisions of the revenue act of 1918, and thereafter paid to the said collector of internal revenue for and on behalf of the defendant herein the sum of $42,851.67 as income and excess-profits and war-profits taxes for said year 1919.

5. That petitioner duly filed with said William H. Edwards, collector of internal revenue for the second district of New York, on or about March 15, 1921, income and excess-profits and war-profits tax return for the year ended December 31, 1920, pursuant to the provisions of the revenue act of 1918, and thereafter paid to the said collector of internal revenue for and on behalf of the defendant herein the sum of $92,265.40 as income and excess-profits and war-profits taxes for said year 1920.

4 6. That on or about the 1st day of September, 1916, petitioner acquired all the business, property, and assets, including name, good will, contracts, and rights of every character and description, of Prentiss Tool & Supply Company, a New York corporation, subject to the debts of said company, and issued in payment therefor all the capital stock of the petitioner of the par value of $500,000, consisting of 5,000 shares of the par value of $100 each; that the actual cash bona fide paid in for said stock or shares as aforesaid, and the actual cash value of tangible property other than cash bona fide paid in for such stock or shares at the time of such payment as aforesaid, amounted to the sum of $994,564.43; that the actual cash value of the said name, good will, contracts, and rights of every character and description bona fide paid in for said stock or shares as aforesaid was $1,400,000.

That included in the tangible properties so acquired by petitioner was certain real estate located in Jersey City, New Jersey, which was entered and carried on the books of the petitioner at an amount of $55,067.08 less than the actual cash value of such property.

That in computing the income and excess-profits and war-profits taxes due from petitioner for each of the years ended December 31, 1918, December 31, 1919, and December 31, 1920, the Commissioner of Internal Revenue has failed, neglected, and refused to include in and as invested capital, and to allow same as paid in surplus, in accordance with the provisions of the revenue act of 1918, the said $55,067.08,

5 being the excess of the actual cash value of said real property over the value thereof appearing on the books of petitioner and over the value allowed therefor by the Commissioner of Internal Revenue in computing invested capital; that said Commissioner has further failed, neglected, and refused to allow as and include in invested capital for said years ended December 31, 1918, December 31, 1919, and December 31, 1920, any part of the said sum of $1,400,000, the actual cash value of the name, good will, contracts, and rights of every character and description for which the capital stock of petitioner was issued in an amount in excess of $125,000, as aforesaid, whereas the said Commissioner of Internal Revenue should have included in said invested capital the said $55,067.08 as paid-in surplus, and $125,000, being twenty-five per cent of the par value of the total stock or shares of petitioner outstanding March 3, 1917. Thereby the invested capital of petitioner was understated in the sum of $180,067.08 by the Commissioner of Internal Revenue in the determination of income and excess profits tax liability for each of said years.

7. By reason of the refusal of the Commissioner of Internal Revenue to include in invested capital of the petitioner the said sum of $180,067.08, said commissioner has illegally, wrongfully, and unlawfully collected and retained from petitioner the sum of $12,719.17 for the year ended December 31, 1918; the sum of $10,000.00 for the year ended December 31, 1919; and the sum of $10,000.00 for the year ended December 31, 1920.

8. That petitioner duly filed claims for refund of over-

6 payments of income and excess-profits taxes as aforesaid, pursuant to the statutes of the United States made and provided, and pursuant to regulations of the Secretary of the Treasury prescribed pursuant to said statutes, upon the ground that said taxes had been illegally and wrongfully assessed and collected.

9. That thereafter certain proceedings were had in connection with the determination of income and invested capital, and in connection with the determination of income and excess-profits taxes of petitioner for the years ended December 31, 1918, December 31, 1919, and December 31, 1920; that from time to time adjustments and changes were made in the income and invested capital of the petitioner and income and excess-profits taxes due for the said years 1918, 1919, and 1920, and certain refunds allowed, no part of which was based upon the inclusion in invested capital of said amount of $180,067.08, and no taxes on account thereof have been refunded and

paid to petitioner, and petitioner's claims for all of said years for inclusion of said sum of $180,067.08 in invested capital have been denied by said commissioner. That two years have not elapsed since the denial and rejection of said claims for refund, and more than six months have elapsed since the filing thereof.

10. The sums of $12,719.17, $10,000.00, and $10,000.00, assessed and collected from petitioner, were illegally and wrongfully collected by the defendant or its agents, and neither on the date of the assessment of said sums by said Commissioner of Internal
7 Revenue, nor on the dates of payment thereof, nor at any time before or since these dates was any part of the income and excess-profits and war-profits taxes herein sued for due and payable by petitioner to the defendant.

11. Petitioner annexes hereto, marked Exhibit A, and makes a part hereof, a schedule of payments by petitioner of income, excess-profits and war-profits taxes for the years herein set forth, together with refunds allowed and paid.

12. This is a suit of civil nature at law and the cause of action herein set forth arises under the laws of the United States providing for internal revenue.

Wherefore, petitioner demands judgment against the defendant in the sum of $32,719.17, with interest on the sum of $12,719.17 from March fifteenth, 1919; with interest on $10,000.00 from August first, 1920; and with interest on $10,000.00 from August first, 1921, or such other sum as is legally proper and refundable to petitioner, and the costs and disbursements of this action.

HENRY PRENTISS & COMPANY, INC.,
By MARSHALL PRENTISS, *Treasurer.*

JEFFERY & REDMOND, Esqs.,
Attorneys for Petitioner.

Office & P. O. address, 14 Wall Street, Borough of Manhattan, New York City.

8 *Schedule A to petition*

1918

Paid: June 16, 1919			$535,144.20
" December 28, 1920			119,191.19
			$654,335.39
Refunded:			
" October 30, 1924	$4,025.68		
" October, 1926	4,452.96		
			8,478.64
Net paid			$645,856.75

1919

Paid: March 15, 1920	$10,843.81
" June 15, 1920	10,843.81
" September 15, 1920	10,843.81
" December 15, 1920	10,843.81
	$43,375.24
Refunded: October, 1926	523.57
Net paid	$42,851.67

1920

Paid: March 15, 1921	$23,066.35
" June 15, 1921	23,066.35
" September 15, 1921	23,066.35
" December 15, 1921	23,066.35
Total paid	$92,265.40

9 [*Duly sworn to by Marshall Prentiss; jurat omitted in printing.*]

10 In United States District Court

[Title omitted.]

Second cause of action to be inserted in the petition

FOR A SECOND SEPARATE AND DISTINCT CAUSE OF ACTION

Thirteenth. The petitioner repeats and realleges the allegations contained in paragraphs one, two, three, four, five, six, seven, nine, ten, eleven, and twelve of the petition.

Fourteenth. That pursuant to the statutes of the United States made and provided, the petitioner filed claims for refund of income and excess-profits taxes illegally assessed and collected for the years 1918 and 1919.

Fifteenth. That said claims for refund did not specifically request the inclusion of the said sum of $180,067.08 in the invested capital of petitioner under section 326 of the revenue act of 1918; but thereafter certain proceedings were had before the Commissioner of

11 Internal Revenue in connection with said claims for refund during which the petitioner submitted to the Commissioner of Internal Revenue full and detailed facts to show that the petitioner was entitled to the inclusion of said sum of $180,067.08 in its invested capital and claimed that it was entitled, under section 326 of the revenue act of 1918, to the inclusion of said amount in its invested capital; that the Commissioner of Internal Revenue considered said claim and rejected it, not because of any failure of the said claims for refund to request the inclusion of said sum in invested capital, but because he claimed that under the law and upon the merits, the petitioner was not entitled to the inclusion of said sum in its invested capital.

Sixteenth. That by reason of the premises, the said Commissioner of Internal Revenue waived any objection to the sufficiency of said claims for refund and waived compliance by petitioner with the provisions of the regulations of the Secretary of the Treasury requiring that all the facts relied upon should be clearly set forth in the claims for refund.

12 In United States District Court

[Title omitted.]

Amended answer

The United States of America, by Charles H. Tuttle, United States attorney for the Southern District of New York, answers the petition and complaint herein, as follows:

First. Admits each and every allegation contained in paragraphs 2, 3, 4, and 5 of the petition herein.

Second. Admits that in computing the income and excess-profits and war-profits taxes due from the petitioner for each of the three years ending December 31, 1918, December 31, 1919, and December 31, 1920, Commissioner of Internal Revenue refused to include in the invested capital of the petitioner the sum of $55,067.08 and also refused to include in invested capital the sum of $1,400,000; except as so admitted, it denies that it has any knowledge or information sufficient to form a belief as to any of the allegations of the 6 paragraph of the complaint.

13

Third. Denies each and every allegation set forth in paragraphs 7 and 10.

Fourth. Denies that petitioner duly filed claims for refund for the calendar years 1918 and 1919, seeking the inclusion of the sum of $180,067.08 in invested capital for said years, and except as herein expressly denied, defendant admits each and every other allegation set forth in the 8 paragraph of the petition herein.

Fifth. Denies so much of paragraph 9 of the petition as purports to allege that claim for refund for the calendar years 1918 and 1919 for the inclusion of the sum of $180,067.08 in invested capital were ever denied by the Commissioner of Internal Revenue, it being the defendant's contention that claims requesting such relief were never filed, and except as herein denied, defendant admits the allegations of paragraph 9 of the petition herein.

FOR A FIRST, SEPARATE, AND DISTINCTIVE DEFENSE WITH RESPECT TO THE PETITIONER'S CLAIM FOR REFUND FOR THE CALENDAR YEAR, 1919

Sixth. That the petitioner's claim for refund for the calendar year 1919 requesting an additional deduction from income in the amount of $13,094.64 was allowed by the Commissioner of Internal Revenue on July 23, 1926.

14 Wherefore, the United States of America, defendant herein, demands judgment dismissing the complaint and petition, together with the costs and disbursements of this action.

CHARLES H. TUTTLE,
United States Attorney for the Southern District of New York,
Attorney for Defendant.

Office and post-office address, U. S. Courts and P. O. Building, Borough of Manhattan, city of New York.

[*Duly sworn to by Leon E. Spencer; jurat omitted in printing.*]

15 In United States District Court, Southern District of New York

HENRY PRENTISS & COMPANY, INC., PLAINTIFF

against

THE UNITED STATES OF AMERICA, DEFENDANT

Judgment

The above-entitled action having been regularly on the the calendar of this court, and having come on for trial before Hon. Francis G. Caffey, district judge, on the 28th day of February, 1930,
16 in the United States court room, old Post Office Building, in the Borough of Manhattan, city of New York, and the petitioner having appeared by Jeffery & Redmond, its attorneys, Joseph F. Murray and William P. Jeffery, of counsel, and the defendant having appeared by Charles H. Tuttle, United States attorney, Leon E. Spencer, assistant United States attorney, of counsel, and the parties having presented their proofs, and the court having duly made its report, and having duly made its findings of fact and conclusions of law, dated January 20, 1931, directing judgment in favor of the petitioner and against the defendant, for the sum of $7,975.21, together with interest according to law on said sum:

Now, on motion of Jeffery & Redmond, attorneys for the petitioner, it is adjudged that the petitioner, Henry Prentiss & Company, Inc., do recover of the defendant, United States of America, the sum of $7,975.21, with interest thereon according to law.

Judgment this 20th day of February, 1931.

CHARLES WEISER, *Clerk.*

17 In United States District Court, Southern District of New York

L. 40/387

HENRY PRENTISS & COMPANY, INC., PLAINTIFF

v.

THE UNITED STATES OF AMERICA, DEFENDANT

Joint bill of exceptions

Before Hon. FRANCIS G. CAFFEY, J.

NEW YORK, *February 28, 1930.*

Appearances:

Jeffery & Redmond, Esqs., for the plaintiff; William P. Jeffery, Esq., and Joseph F. Murray, Esq., of counsel.

Charles H. Tuttle, Esq., for the defendant, by Leon E. Spencer, Esq., assistant U. S. attorney.

WILLIAM P. JEFFERY, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. MURRAY:

Q. You are one of the attorneys for the plaintiff, Mr. Jeffery?—A. I am.

18 Q. And have you been attorney for the Henry Prentiss & Company, Inc., for a considerable time?—A. For the Henry Prentiss & Company, Inc., and the predecessor company something over 25 years.

Q. And are you familiar with the organization of the plaintiff?—A. I am.

Q. Will you briefly tell the court about the organization of the plaintiff, and the acquisition of the properties of the predecessor corporations?—A. The predecessor corporation was the Prentiss Tool & Supply Company, which was organized about 1878. The new corporation, the plaintiff in this action, was organized the latter part of August, 1916, originally with a capital of $10,000.

The COURT. The new company?

The WITNESS. Yes; the new company.

A. (Continuing.) There was transferred the latter part of August, 1916, from the old company some shares of Atchison shares of stock which stood on the books at $10,000, which had a book value of $10,000, approximately, and an actual value of $10,000. For this the new company issued all of its capital stock, $10,000.

About the next day the capital of the plaintiff was increased to $500,000. Resolutions were adopted by both companies under which the old company, the officers of the old company, were instructed to transfer all of the business property and assets of the old com-

pany, including the name, good will, contracts, and like tangibles, and to receive therefor $490,000 par value of the capital stock of the new company.

19 The new company adopted similar resolutions and the officers were instructed to acquire all of the tangible assets and the good will, contracts, and so forth, of the old company, and to issue $490,000 par value of stock. This was carried out. The transfer was made, and the stock was issued, as I have outlined.

I have copies of the resolutions. I do not know whether you want to put them in.

Mr. MURRAY. We have stipulated that the resolutions that are here, your honor, may go in without proving them by the officers of the corporations.

The COURT. You will make the stipulation a part of the record.

Mr. MURRAY. Yes.

Q. What was the value of the assets acquired by the plaintiff corporation from the predecessor corporation so far as the tangible properties were concerned?—A. The book value of the tangible assets of the predecessor corporation at the time of the transfer amounted to the sum of $1,016,466.66. This was subdivided, or rather consisted of cash, receivables, inventory, some securities, investments, and real estate subject to debts for about the figure given before.

The actual value of the property acquired was the same in all cases with the exception of real estate, which, it has been stipulated for this action, had an actual value of $81,000 on September 1, 1916. The book value of real estate amounted to——

(Mr. Murray hands paper to the witness.)

20 A. (Continuing.) $34,628.92. The difference between the book value and the actual value of real estate is $46,371.08. Adding the book value and the excess value of real estate gives a total value, actual value for tangibles acquired by the plaintiff corporation, of $1,062,837.74.

The COURT. In the $1,016,466.66?

Q. In the $1,016,466.66 you had included the $10,000 value of stock?—A. Yes. The above book total was the amount on the books prior to the transfer of $10,000 Atchison, Topeka and Santa Fe stock; deducting this $10,000, for which 100 shares were specifically issued, leaves a balance of tangibles of $1,052,837.74 tangibles acquired in the final transfer.

Mr. SPENCER. I will state that on the books of the predecessor company there was no sum carried for good will. The plaintiff company took over the property of the predecessor company, entered on its books the assets exactly as they previously appeared on the predecessor company. There was no closing of the books of the old and the opening of the books of the plaintiff company except the adjustment in connection with the amount of capital and the amount of surplus. The new company, the plaintiff, did not enter any amount on its books for good will at any time.

I did not mean in my previous statement that good will was entered on the books. I did not mean to vary the books, but I mean
21 simply to state, according to the stipulation, the value of good will acquired was $300,000.

Q. With these figures, Mr. Jeffery, will you compute, or have you computed, the proportion which the tangibles bear to the total values, and the proportion which the intangibles, the value of the intangibles bear to the total values?—A. I have. The total tangibles and intangibles acquired amounted to $1,352,837.74.

Q. That is, including in that the $300,000 value of good will which we have stipulated?—A. Yes; the $300,000, the value previously stated for good will, is 22.2 per cent of the total tangibles and intangibles acquired. The amount of stock issued for the above aggregate of tangibles and intangibles had a par value of $490,000.

I think there was a mistake in the minutes where the value of good will, $300,000, or rather where 22.2 per cent was stated to be the proportion of tangibles and intangibles to the total acquired; it should be 22.2 per cent is the proportion of intangibles to the total acquired.

The COURT. You mean by good will all intangibles?

The WITNESS. All intangibles; yes.

A. (Continuing.) The computation: The total stock issued for the above tangibles and intangibles was $490,000 par value; 22.2 per cent of $490,000 is $108,780; 77.8 per cent is $318,000.

Q. Have you computed, Mr. Jeffery, what the tax would
22 have been payable by the taxpayer for the year 1918 if there had been included in invested capital for that year the actual value of real property as of September 1, 1916, the book value of September 1, 1916, plus the increased value which has been stipulated should be included, together with the sum of $107,500 for intangibles?—A. I have.

Q. Will you state what that computation is?—A. Invested capital as heretofore found by the Commissioner of Internal Revenue for the year 1918 was $1,521,947.97. In arriving at this total real estate was included in the sum of $34,628.92. The actual of real estate as of September 1, 1916, as per stipulation, was $81,000, divided at $23,000 to land, and $58,000 to building. I have reduced the value of the building for depreciation from September 1, 1916, to January 1, 1918, at the rate of 3 per cent. This would make a reduction of $2,300, leaving a residue value of January 1, 1918, for real estate of $78,700; deducting from this the amount previously allowed by commissioner for real estate would leave an additional invested capital from real estate of $44,071.08; adding to this $107,500 for good will or intangibles——

A. (Continuing.) $107,500, as stipulated, would give an adjusted or corrected invested capital on the above computation of $1,673,519.05.

In the above computation real-estate depreciation at 3 per cent for the year 1918 amounted to $1,725. In the income as found by

commissioner no depreciation had been charged against real estate, but in the above computation is charged for the purpose of determining the 1918 value.

23 The income, the net income as heretofore determined by the commissioner for the year 1918, is $951,058.74; if depreciation, $1,725, is deducted from the amount previously given, the net income would be $949,333.74.

Based upon corrected income and invested capital, as stated above, a calculation of the books—a calculation of the excess profits and income tax would show a total tax of $632,684.20. The amount of tax which has been paid by the plaintiff for the year 1918 was $644,776.20, and excess-profits tax based upon the above computation of $12,092.

Q. When were the taxes paid for 1918?

Mr. SPENCER. Just a minute. May I interrupt there for a moment? Of course, it is understood that Mr. Jeffery's testimony is his opinion of what the computation would be.

Mr. MURRAY. Yes.

Mr. SPENCER. I am not conceding that his computation is correct.

Mr. MURRAY. That is right.

Q. When were the taxes for 1918 paid?—A. $535,000 taxes were paid in quarterly installments during 1919. There was an additional assessment of 119,000 some odd dollars made and paid November 28, 1920. I have made an interest computation from the latter date, November 28, 1920; computed from that date to February 15 of this year at the rate of six per cent, the interest on the above excess of $12,092 would be $6,680.83.

24 Q. Now, have you computed for the year 1920, Mr. Jeffery, based upon these inclusions for real property and good will?—A. Yes; in order to do that, it is necessary to compute 1919, because the adjustment for one year affects subsequent years.

Q. Have you done that?—A. I have. I do not know whether you want me to give the matter in complete detail.

The COURT. I think you better do that.

A. (Continuing.) Or you may prefer to put it in memorandum form.

A. (Continuing.) Invested capital as heretofore found by commissioner amounted to $1,975,043.33.

Q. This was 1919?—A. This was 1919. The excess value of real estate for 1918, as previously stated, amounted to $44,071.08. From this I deduct $1,725, representing depreciation of 3 per cent during 1918. This would leave an excess value of real estate over the amount previously allowed, or allowed by the commissioner of $42,346.08. To this I add good will $107,500. I have made a further addition of invested capital of $5,110.08.

This amount is 42 2%00 per cent of the principal amount of over-assessment for 1918. I will express it as over-assessment for 1918. This percentage is a percentage heretofore used by the Commissioner

of Internal Revenue in charging invested capital with 1918 taxes, charging 1919 invested capital with 1918 tax. The total of these adjustments is $154,956.16.

25 Adding this to the invested capital previously found by commissioner would produce an adjusted investment capital of $2,129,999.49.

In the above invested-capital adjustment depreciation has been taken on the corrected values, $1,725. Depreciation actually taken and heretofor allowed as a deduction from income for 1919 was $1,308.35. The proper depreciation on the new value—this is $416.65 less than the proper 3 per cent depreciation on the corrected value. Deducting the excess depreciation from income as heretofore found will leave an adjusted net income of $269,450.47.

A computation of excess-profits and income taxes on the above adjusted figures shows a total tax of $40,503.64. The tax heretofore assessed and paid is $42,851.67, showing an excess of taxes paid, according to the above computation, of $2,348.03.

If you compute interest on this as the 1919 claim is withdrawn——

The COURT. This is for 1919?

A. (Continuing.) Yes; 1919. The 1919 computation is only material because of the effect on 1920 invested capital adjustment.

For the year 1920 the invested capital as found by the commissioner is $1,583,933.72.

The real estate, the excess value of real estate, for 1919, as previously testified, was $42,346.08. I have deducted from this depreciation for the year 1919 at 3 per cent on corrected value. This depreciation amounts to $1,725, leaving a residue value—residue excess value of $40,621.08.

26 I think I have made a slight error in that, because I have assumed that the commissioner has heretofore allowed $32,000, or rather $34,628.92, for real-estate invested capital. As a matter of fact, for 1920 some depreciation had been taken, and the amount heretofore allowed was somewhat less, so this calculation is subject to that minor correction.

To the above excess value for real estate I have added good will, $107,500.

I have added the entire 1918 overassessment, which I previously computed at $12,092. I have added the same proportion of the 1919 overassessment as previously had been deducted by the commissioner, $992.28.

This makes a total adjustment, or additions to invested capital, of $161,205.36. Adding this sum to the invested capital as previously determined by the commissioner produces a total adjusted invested capital of $1,745,139.08.

The income as heretofore found by commissioner for 1920 amounted to $382,858.32. Depreciation taken during 1920, based upon old values, was $785. The rate for depreciation being heretofore used in this calculation is $1,725, a difference of $940. If this

difference is deducted from income, the adjusted net income would be $381,918.32. The income in excess and profit tax computed for 1920, computed on the above adjusted income and invested capital, would be $83,701.05.

The total tax heretofore assessed and paid is $92,265.40, an excess paid of $8,564.35.

The tax heretofore paid for the year 1920 was paid in four
27 installments, March 15, June 15, September 15, and December 15, 1921. I have taken an average date—I think August 1, but I am not sure of the date—from such average date to February 15, 1930. Interest calculated at 6 per cent is $4,363.93. That is subject to a minor correction. As heretofore stated, there is some minor correction to be made in connection with the adjusted value of real estate, but it is very small.

Mr. MURRAY. If the court please, I wish to offer in evidence some papers here, the 1918 tax return of the taxpayer.

Mr. SPENCER. No objection.

(Marked "Plaintiff's Exhibit 1.")

Mr. MURRAY. I offer in evidence the 1920 tax return of the taxpayer.

Mr. SPENCER. No objection.

(Marked "Plaintiff's Exhibit 2.")

Mr. MURRAY. The 1918 refund claim.

The COURT. Any objection?

Mr. SPENCER. No objection.

(Marked "Plaintiff's Exhibit 3.")

Mr. MURRAY. I offer in evidence the income-tax return for 1919, solely for computation purposes, your honor.

(Marked "Plaintiff's Exhibit 4.")

The COURT. Have you the refund claim for 1920?

28 Mr. MURRAY. Yes, your honor; but I will offer them in order.

Do you consent, Mr. Spencer, or will you stipulate that the 1918 refund claim was duly filed, this particular one (Exhibiting to Mr. Spencer)?

Mr. SPENCER. There is no question as to the date, the correctness of the date of filing of that claim.

Mr. MURRAY. I offer a letter dated May 13, 1924, from the Treasury Department.

The COURT. To the taxpayer?

Mr. MURRAY. To the taxpayer.

Mr. SPENCER. No objection.

(Marked "Plaintiff's Exhibit 5.")

Mr. MURRAY. I offer a letter dated June 23, 1924, from the Treasury Department to the taxpayer.

Mr. SPENCER. No objection.

(Marked "Plaintiff's Exhibit 6.")

Mr. MURRAY. Now I asked Mr. Spencer to produce a brief and application for relief in support of claim for refund 1918, dated June 26, 1924. Mr. Spencer says he has not got this instrument. Will you consent to the admission in evidence of this copy, Mr. Spencer (handing to Mr. Spencer)?

Mr. SPENCER. My objection to the admission of this will not
29 be that it is a copy. However, if the taxpayer offers it as an amendment to the claim for refund as originally filed, I must object. If he offers it as containing additional data to support the plaintiff's claim for refund, I will consent to its admission.

Mr. MURRAY. Well, I did not have in mind offering it as an amendment to the original claim for refund. My purpose solely is in showing what transpired before the Commissioner of Internal Revenue so that the court might properly see whether there was any basis for the claim that the commissioner had before it facts sufficient to decide whether or not we were entitled to the relief. I do not like the limitation of Mr. Spencer, although I cannot see just now what harm it would do to have it go in on that basis.

The COURT. I will overrule the objection and the defendant may have an exception. I will receive it without passing on what effect it may have.

(Marked "Plaintiff's Exhibit 7.")

Mr. MURRAY. I offer in evidence letter dated June 26, 1925, from the Treasury Department to the taxpayer.

Mr. SPENCER. No objection.

(Marked "Plaintiff's Exhibit 8.")

Mr. MURRAY. I offer in evidence letter dated July 16, 1925, from the Treasury Department to the taxpayer.

30 Mr. SPENCER. No objection.

(Marked "Plaintiff's Exhibit 9.")

Mr. MURRAY. I offer letter dated February 23, 1926, from the Treasury Department, Solicitor of Internal Revenue, to the taxpayer.

Mr. SPENCER. I understood you to say letter from the Treasury Department; I suggest that you correct it, and say from the Commissioner of Internal Revenue. No objection then.

(Marked "Plaintiff's Exhibit 10.")

Mr. MURRAY. I offer letter of March 3, 1926, from the Solicitor of Internal Revenue to the plaintiff.

Mr. SPENCER. If your honor please, this is a letter written by the Solicitor of Internal Revenue, Department of Justice, to the Henry Prentiss & Company. In so far as this letter attempts to in any way bind the Commissioner of Internal Revenue, or to indicate that he had before him in his office any request from the taxpayer looking toward a review of the general question of taxes due for '18 and '19——

Mr. SPENCER. I will object to it in so far as it is a letter from the solicitor's office to the taxpayer. This may be one of several letters written by other departments where other departments had

agreed to consult the taxpayer concerning various phases
31 of his claim. I do not want that considered as the filing, or leading toward the filing of an amended claim for refund, because it had nothing to do with the commissioner's office in connection with it at all. They simply made application for some consideration, and they were told they would hear from them.

Mr. MURRAY. Well, this letter, so far as I am concerned, is clear that it must be taken in conjunction with Exhibit 10, the letter of February 23, where the solicitor wrote on the stationery of the Commissioner of Internal Revenue, "that this office has before it for consideration in connection with your income and profits taxes for 1918 and 1919 your application for special assessment. Some question has arisen as to the denial of special assessment. Before a final decision is reached you will be granted an opportunity to be heard orally if you so desire," and the letter of March 3, 1926, is in connectio nwith this oral hearing. It sets it down for an oral hearing for March 15.

Mr. SPENCER. That appears to be the case in the letters; however, even if that is so you have not any objection to that going in as being from the Solicitor of Internal Revenue, Department of Justice, as it purports to be.

Mr. MURRAY. Oh, no; no.

(Marked "Plaintiff's Exhibit 11.")

32 Q. Mr. Jeffery, did you appear in Washington on March 15, 1926?—A. I did.

Q. Where did you appear?—A. I saw Mr. Lansforth at the solicitor's.

Q. And this was in connection with the 1918 refund claim of the plaintiff?—A. Yes; we previously received a letter that his office had had the matter before him, and an appointment was made and I went down to see him.

Q. I show you this Exhibit 11, and ask you whether it was in pursuance of that letter that you appeared on March 15, 1926 [handing to the witness]?—A. Yes; there was a previous letter in which he first brought the matter of my attention.

Q. That is Exhibit 10 [handing to the witness]?—A. Yes; that initiated this conference with Mr. Lansforth.

Q. Briefly, will you state what transpired at that hearing on March 15.

Colloquy between court and counsel

Mr. SPENCER. If your honor please, if Mr. Murray wants testimony which would amount to an amended claim for refund, or any variation of the claim for refund as filed, I must object to the testimony for the reason that the Revised Statutes, section 3226, and the regulations enacted thereunder, provide how claim for refund shall be filed, and what it shall state; in other words, it shall state all the grounds upon which the taxpayer relies, and all the facts necessary

for a determination by the Commissioner of Internal Revenue
33 of a claim for refund. If the testimony is going to be to substantiate the claim for refund, I have no objection; if it is to be at variance, or to amend the claim, I must object to the testimony.

Mr. MURRAY. Well, we have not sued on any amended claim. We have sued on the original claim as taken, with an additional, second claim now that there was a waiver of any objection to the sufficiency of that original claim, and the purpose of the testimony is to controvert the Government's allegations that this question was never considered, the question of the inclusion in invested capital of these additions.

Mr. SPENCER. If your honor please, referring again to the claim for refund for the calendar year 1918, there is nothing in that claim for refund which requests any relief in the line of increased invested capital. It requests relief under sections 327 and 28 of the revised act of 1918, and if the testimony is to show that they requested relief from the commissioner under section 326 of the revenue act of 1918, then it will be irrelevant and immaterial, because it conflicts with the law and regulations requiring claims to be in writing and under oath.

Mr. MURRAY. Now, on this point of its being in conflict with the regulations, your honor, I at this time desire to call the court's attention to the fact that the regulations in effect at the time,
34 during all this period between 1918 and 1926, the regulations provided as to claims for refund, that all the facts relied upon in support of the claims should be clearly set forth under oath—all the facts.

Now I call the court's attention to the fact that in 1929 the regulations were amended so as to require the statement of the grounds for a refund as distinguished from the facts. Now all the regulations required at the time were the facts.

Mr. SPENCER. I wish to say something on that point.

Afternoon session

Mr. MURRAY. Your honor, I offer in evidence application for refund and relief, dated April 8, 1926.

The COURT. That is 1920?

Mr. MURRAY. That is 1918, your honor.

(Marked "Plaintiff's Exhibit 12.")

Mr. MURRAY. It is stipulated, your honor, that this application was filed with the office of the Commissioner of Internal Revenue on or about April 12, 1926.

The plaintiff and the defendant are stipulating as to the closing balance sheet of Prentiss Tool & Supply Company as of August 31, 1916, and as to the opening balance sheet of Henry Prentiss & Company as of September 1, 1916.

And it is further stipulated that anything that Mr. Jeffery
35 might testify to, might have stated as to figures contained in such balance sheets, that if such statements are contradictory of the figures in such balance sheets as stipulated, that the figures in the balance sheets as stipulated shall control.

Mr. SPENCER. Mr. Jeffery will be here in a moment. In the meantime, I will make this statement for the court: In so far as the testimony of Mr. Jeffery states any method of computation of any tax, I renew my motion to strike out that testimony from the record as being entirely extraneous as a matter of evidence; in other words, in these internal-revenue cases the computation, strictly speaking, forms no part of the record.

The COURT. I shall so understand it.

Mr. SPENCER. It is for the purpose of the record; if it ever goes up, then I make this motion.

The COURT. It is merely helping me. The theory I have to make myself, and I shall so understand.

Mr. SPENCER. In so far as the testimony of Mr. Jeffrey states his method of computation, does your honor rule that that should not be considered a part of the record, or should be stricken out, or will you leave it in?

The COURT. I am going to leave it in.

Mr. SPENCER. You will give me an exception, because there has been criticism in various cases because it has not been taken.

The COURT. Yes.

36 WILLIAM P. JEFFERY resumes the stand.

Direct examination resumed by Mr. MURRAY:

Q. I show you Exhibit 10, which is a letter from the Solicitor of Internal Revenue, dated February 23, 1926, and ask you whether between July 16, 1925, and the date of that letter you had been in communication in respect of Prentiss Company tax matters for 1918 with the Solicitor of Internal Revenue, or the Commissioner of Internal Revenue (handing to witness)?—A. No.

Q. So this letter came unsolicited from Washington, did it?—A. (No answer.)

Q. Now, I understand that you appeared at the office of the Solicitor of Internal Revenue on March 15, 1926, for a hearing of the taxpayer's 1918 claim for refund?—A. I do not recall the exact date, but it is approximately that time, following the letter of February 23.

Q. Well, does that Exhibit 11 refresh your recollection as to the date of the hearing (handing to witness)?—A. Well, I would say it was about that date, or near to it.

Q. Whom did you see representing the solicitor on that date?—A. Mr. Lansforth of the solicitor's office.

Q. Will you state what conversation was had between you and Mr. Lansforth at that time?

Mr. SPENCER. Wait just a minute. I object to that question, your honor, on the ground that this evidence is incompetent, irrelevant, and immaterial in that whatever he said, whatever conversa-
37 tions he had with the Solicitor of Internal Revenue, and whatever statements the Solicitor of Internal Revenue may have made to him with reference to the liability of Henry Prentiss & Company, Inc., for any taxes are absolutely extraneous to the question here. He is attempting to get evidence which purports to effect the claim for refund. A claim for refund must be filed in a certain way, must be in writing, must state certain grounds. Whatever Mr. Jeffery testifies can not show what the claim for refund was, or what the claim contained.

The COURT. What is your theory?

Mr. MURRAY. My theory is this, your honor, that the main, or one of the principal objections which the Government now raises is that the question of the right to include in invested capital these amounts for good will and value of real estate was not considered by the Commissioner of Internal Revenue, and this testimony goes to the question of whether that question was considered by the Commissioner of Internal Revenue, and if it was considered, it is in support of my contention that the Commissioner of Internal Revenue waived any defect of form rather than substance in the claim for refund.

The COURT. Objection sustained; you may note your exception.

Q. There has been offered in evidence as Exhibit 12 an application for refund and relief dated April 8, 1926, Do you know
38 whether that was filed with the Solicitor of Internal Revenue (handing to witness)?—A. I do.

Q. Do you know approximately when it was filed?

The COURT. Filed with the commissioner?

Mr. MURRAY. With the Solicitor of Internal Revenue.

A. It was filed at the second hearing I had before Mr. Lansforth, a few days after this is dated; this is dated April 8, 1926, and the hearing was on April 12, 1926, and that was the date I filed it.

Q. In other words, after the hearing of March 15 there was another hearing had before Mr. Lansforth?—A. There was, on April 12.

Q. Between the hearing of March 15 and the hearing of April 12, 1926, this application was prepared?—A. Yes.

Colloquy between court and counsel

Mr. MURRAY. I assume, your honor, that the same ruling would be made as to any conversations at any other time with Mr. Lansforth?

The COURT. Yes.

Mr. MURRAY. Have you the 1920 refund claim?

(Mr. Spencer produces.)

Mr. MURRAY. I offer in evidence taxpayer's 1920 refund claim.

Mr. SPENCER. No objection.

(Marked "Plaintiff's Exhibit 13.")

39 Mr. MURRAY. I offer in evidence letter dated September 25, 1926, from the Treasury Department, Commissioner of Internal Revenue office, to the taxpayer denying the taxpayer's 1920 claim for refund.

The COURT. Any objection?

Mr. SPENCER. All right; no objection.

(Marked "Plaintiff's Exhibit 14.")

Mr. MURRAY. If the court please, I offer in evidence the defendant's original answer filed on this action.

The COURT. Any objection?

Mr. SPENCER. No objection.

(Marked "Plaintiff's Exhibit 15.")

Mr. SPENCER. If your honor please, is it not the fact that these pleadings form a part of the record without introduction in evidence?

The COURT. Yes; but it is perfectly proper to put them in evidence.

Mr. MURRAY. A pleading which has been superseded.

The COURT. Yes.

(At this point the witness left the stand, with the consent of the court, to confer with counsel.)

Mr. SPENCER. No cross-examination.

Mr. MURRAY. Now, if the court please, if Mr. Spencer consents, I reserve the right to offer in evidence some two or three letters

40 from the Commissioner of Internal Revenue. I offer in evidence letter dated September 17, 1925, from the Commissioner of Internal Revenue to the taxpayer showing the determination by the commissioner of the taxes due by the taxpayer for the years 1918 and 1919. You see, there was certain assessment, overassessment, and we need this in order to finally compute.

Mr. SPENCER. No objection.

(Marked "Plaintiff's Exhibit 16.")

Mr. MURRAY. Now, there are two other letters, your honor, which seem to have been mislaid, which I will reserve the right to offer in evidence with Mr. Spencer's consent or we may stipulate those.

The COURT. If stipulated as to those, we won't have to have them. When produced they will be marked "Exhibits 17 and 18."

Mr. MURRAY. The plaintiff rests, your honor.

Mr. SPENCER. If your honor please, I offer in evidence the final balance sheets of Henry Prentiss & Company, Inc., for the year 1918.

The COURT. For what year?

Mr. SPENCER. 1918.

Mr. SPENCER. For the years ending December 31, 1917, and December 31, 1918.

The COURT. Any objection?

Mr. MURRAY. I object, your honor, on the ground that this assumes only to be an auditor's report, and the balance sheets

41 for 1918 are already in evidence attached to the return for the year 1918.

Mr SPENCER. If your honor please, this is a copy of the balance sheet, a copy of the books of Henry Prentiss & Company made by the taxpayer's own accountants, certified by them, and whether or not they are exactly the same as the return indicates I am not at this time able to say, but I can see no objection to the submission of their own auditors' report of their books and accounts.

Mr. MURRAY. It just encumbers the record; it is in twice.

Mr. SPENCER. Not all of it.

The COURT. Well, I can not tell.

You are not objecting on the ground that it is incompetent?

Mr. MURRAY. No.

The COURT. Received; objection overruled.

(Marked "Defendant's Exhibit A.")

Mr. SPENCER. I offer in evidence balance sheet of Henry Prentiss & Company for the year ending December 31, 1919.

Mr. MURRAY. The same objection.

The COURT. The same ruling.

(Marked "Defendant's Exhibit B.")

Mr. SPENCER. I offer in evidence balance sheet of Henry Prentiss & Company, Inc., for the calendar year ending December 31, 1920.

Mr. MURRAY. The same objection.

The COURT. The same ruling; Exhibit C.

(Marked "Defendant's Exhibit C.")

42 In United States District Court

[Title omitted.]

Stipulation of facts

It is hereby stipulated and agreed as follows:

First. That the copies of the resolutions of Prentiss Tool & Supply Company and of Henry Prentiss & Company, Inc., annexed hereto, may be offered in evidence with the same force and effect as though they had been proved by the proper officers of said companies.

Second. That the property and assets mentioned in said resolutions were transferred to Henry Prentiss & Company, Inc., pursuant to and as provided in said resolutions.

Third. That Henry Prentiss & Company, Inc., issued and delivered its capital stock to the persons and in manner provided in said resolutions.

Fourth. That included in the property and assets acquired
43 by the plaintiff from Prentiss Tool & Supply Company was certain real estate consisting of land and a warehouse located in Jersey City, New Jersey, which was owned by plaintiff during the years 1918, 1919 and 1920.

Fifth. That the Commissioner of Internal Revenue, in computing the income and excess-profits and war-profits taxes due from plaintiff for each of the years ending December 31st, 1918, December 31st,

1919, and December 31st, 1920, included in the invested capital of plaintiff for each of said years, only the sum of $34,628.92 as the actual value of said real estate.

Sixth. That the actual value of said real estate on September 1st, 1916, was $81,000.00, divided as follows, land value $23,000.00 and building value $58,000.00.

Seventh. That in computing the income and excess-profits and war-profits taxes due from plaintiff for each of the years ending December 31st, 1918, December 31st, 1919, and December 31st, 1920, the Commissioner of Internal Revenue did not include in and as invested capital any sum for intangible property, including name, good will, contracts, and rights.

Eighth. That the actual value of intangible property acquired by the plaintiff, including name, good will, contracts, and rights, was on September 1st, 1916, in excess of the sum of $300,000.00.

Ninth. That in the event that the court determines, in this
44 action, that the plaintiff is entitled to the inclusion in invested capital of any amount for intangible property, the amount thereof shall be taken and fixed at $107,500.00.

Tenth. That plaintiff withdraws any claim for refund on account of taxes assessed against and paid by plaintiff for the year 1919.

Eleventh. That nothing in this stipulation shall be construed as an admission on the part of the defendant that the plaintiff is entitled to the inclusion in invested capital of any amount for intangible property.

JEFFERY & REDMOND,
Attorneys for Plaintiff.
CHARLES H. TUTTLE,
Attorney for Defendant.

Dated, New York, February 26th, 1930.

45 *Resolutions annexed to statement of facts*

[Extract from minutes of meeting of the incorporators and subscribers of Henry Prentiss & Company, Inc., held August 17, 1916]

RESOLVED, That this company be authorized to purchase 100 shares of the Atchison, Topeka & Santa Fe Railway Company of the par value of $10,000 and to pay therefor the sum of $10,000 and to issue stock of the company of the par value of $10,000 and deliver the same in payment thereof in lieu of cash, provided, in the opinion of the board of directors, said stock is reasonably worth the sum of $10,000.

[Extract from minutes of meeting of directors of Henry Prentiss & Company, Inc., held August 17, 1916]

RESOLVED, That the board of directors of this company is of the opinion that the 100 shares of stock of Atchison, Topeka & Santa Fe Railway Company offered for sale to this company are reasonably

worth the sum of $10,000, and the officers of the company are hereby authorized, empowered, and directed to purchase said stock for $10,000 and to issue stock of this company of the par value of $10,000 in full payment therefor.

RESOLVED, That the incorporators and subscribers, having waived their rights to the stock of this corporation, according to their
46 subscriptions, as appears from the certificate of incorporation, the stock so subscribed for by the incorporators and subscribers be issued as part of the purchase price of the 100 shares of stock of the Atchison, Topeka & Santa Fe Railway Company hereinbefore authorized to be purchased.

[Extract from minutes of special meeting of the stockholders of Henry Prentiss & Company, Inc., held August 25, 1916]

RESOLVED, That this company purchase the business property and assets, real and personal, including name, good will, contracts, and rights of every character and description, subject, however, to its debts and obligations, for the sum of $490,000, and to issue stock of the company of the par value of $490,000 and deliver the same in payment thereof in lieu of cash, provided, in the opinion of the board of directors, such property is reasonably worth the sum of $490,000.

[Extract from minutes of meeting of board of directors of Henry Prentiss & Company, Inc., held August 25, 1916]

The secretary then stated that this company was originally organized with an authorized capital of $10,000, and that thereafter the capital stock was increased to $500,000, consisting of 5,000 shares of the par value of $100 each; that all the steps required by law for the increase of the capital stock had been completed.

47 The chairman then stated that the Prentiss Tool & Supply Company, a New York corporation, had offered to sell, assign, and transfer to this company all its business, property, and assets, real and personal, including name, good will, contracts, and rights of every character and description, subject, however, to its debts and obligations, for the sum of $490,000.

On motion duly made and seconded, the following resolution was unanimously adopted:

"Whereas, the Prentiss Tool & Supply Company, a corporation organized under the laws of the State of New York, has offered to sell, assign, and transfer to this company all its business, property and assets, real and personal, including name, good will, contracts and rights of every character and description, subject, however, to its debts and obligations, for the sum of $490,000, and is willing to accept stock of this company of the par value of $490,000 in lieu of cash; and

"Whereas, by a resolution adopted at a meeting of the stockholders of said company the purchase of said business on said terms was authorized, provided the same was, in the opinion of the board of directors of this company, reasonably worth the sum of $490,000; and

"Whereas, the board of directors of this company is, after examining into the value of said business and property, of the opinion
48 that the same is reasonably worth the sum of $490,000 and it is necessary for the business of this company, and that it is to the interest of this company to purchase the same.

"Now, therefore, be it

"RESOLVED, That this company purchase from the Prentiss Tool & Supply Company the business of the said company, together with all its property and assets, real and personal, including name, good will, contracts, and rights of every character and description, subject, however, to its debts and obligations, and pay therefor the sum of $490,000, and upon receipt of sufficient deeds, assignments, and transfers of property as this company may by its counsel be advised are necessary and proper the officers of this company are hereby authorized, empowered, and directed to issue to the Prentiss Tool & Supply Company, or its assigns, stock of this company of the par value of $490,000 in full payment therefor.

"RESOLVED, That upon the payment to this company by the Prentiss Tool & Supply Company of its funds on deposit with any bank, trust company, or banking institution, any such bank, trust company and banking institution is authorized and empowered to pay and charge against the account of this company such checks of the Prentiss Tool & Supply Company as may be presented for payment.

"RESOLVED, That this company shall, and it hereby does, as-
49 sume all of the debts, liabilities, and obligations of the Prentiss Tool & Supply Company, and agrees to pay the same according to the liability of the Prentiss Tool & Supply Company, and in all respects to perform and carry out all contracts and business engagements of the said Prentiss Tool & Supply Company according to the liability and obligation of such company."

[Extracts from minutes of meeting of stockholders of Prentiss Tool & Supply Company, held August 25, 1916]

Whereas, Henry Prentiss & Company, Inc., was organized, and its capital increased to the sum of $500,000, for the purpose of taking over the business, property and assets of this company, subject to its obligations, and it is to the interest of this company to transfer its said property to the said Henry Prentiss & Company, Inc., in return for all of its capital stock,

Now, therefore, be it

RESOLVED, That the act of the officers of this company in selling to Henry Prentiss & Company, Inc., 100 shares of the stock of the Atchison, Topeka & Santa Fe Railway Company for 100 shares of the capital stock of said Henry Prentiss & Company, Inc., be, and the same hereby is, ratified, confirmed, and approved.

FURTHER RESOLVED, That the Directors of this company be,
50 and they hereby are, authorized and empowered to sell the business, property, and assets, real and personal, of this company, including name, good will, contracts, and rights of every char-

acter and description, subject, however, to its debts and obligations, for the sum of $490,000 to Henry Prentiss & Company, Inc., and to accept in lieu of cash therefor all of the remaining capital stock of Henry Prentiss & Company, Inc., to wit, 4,900 shares, of the par value of $100 each, total $490,000.

FURTHER RESOLVED, That the Directors of this company are authorized to distribute pro rata among the stockholders of this company the stock of said Henry Prentiss & Company, Inc., and to direct the said Henry Prentiss & Company, Inc., to issue its stock according to such pro rata distribution.

[Extract from minutes of board of directors of Prentiss Tool & Supply Company, held August 25, 1916]

RESOLVED, That this company sell to Henry Prentiss & Company, Inc., its business property and assets, real and personal, including name, good will, contracts, and rights of every character and description, subject, however, to its debts and obligations, for the sum of $490,000, and the officers of the company are hereby authorized to accept in lieu of cash therefor all the remaining capital stock of Henry Prentiss & Company, Inc., to wit, 4,900 shares of the par value of $100 each, total $490,000.

51 It was further

RESOLVED, That said 400 shares of stock of Henry Prentiss & Company, Inc., together with the 100 shares of stock heretofore issued in the names of Marshall Prentiss, George L. Wilson, and Charles A. Goodspeed, be distributed pro rata among the stockholders of this company. The officers of the company are hereby authorized, empowered, and directed to instruct the said Henry Prentiss & Company, Inc., to issue its stock according to such pro rata distribution as set forth in the letter of this company to Henry Prentiss & Company, Inc., dated August 15, 1916; the 100 shares of stock heretofore issued to Marshall Prentiss (50), George L. Wilson (25), and Charles A. Goodspeed (25) to be retained by them and to be their own property.

And it was further

RESOLVED, That the officers of this company be, and they hereby are, authorized and directed to execute and deliver to Henry Prentiss & Company, Inc., in exchange for said stock of said company, all assignments, deeds, bills of sale, or other documents of transfer to vest in said Henry Prentiss & Company, Inc., all rights and titile of this company in and to any and all of its property and rights.

RESOLVED, That any bank, trust company, and banking institution with which this company shall have an account is hereby authorized and requested to transfer, on September 1, 1916, to

52 the credit of Henry Prentiss & Company, Inc. only All outstanding checks of the Prentiss Tool & Supply Company which may be presented for payment shall, however, be paid out of this fund so transferred and charged to the account of Henry Prentiss & Company, Inc.

RESOLVED, That any checks, drafts, notes, or orders for the payment of money drawn to the order of or payable to this company are the property of Henry Prentiss & Company, Inc., and the same may be deposited to the account of said Henry Prentiss & Company, Inc., by any banking institutions with which said company may have an account, without endorsement of this company, and the endorsement of Henry Prentiss & Company, Inc., on any such check, note, draft, or order for the payment of money shall be sufficient and shall be binding upon this company.

53 In United States District Court, Southern District of New York

L. 40/387

HENRY PRENTISS & COMPANY, INC., PLAINTIFF

against

UNITED STATES OF AMERICA, DEFENDANT

Opinion, Caffey, J., dated June 27, 1930

Though the action was tried last February, it was not argued or submitted until the 23rd instant. As explained to counsel, it is essential that I dispose of it this week, before leaving on vacation. After I resume sitting in September, my time will be absorbed by new matters. Accordingly, without attempting a full exposition of the grounds, the points involved are determined as follows:

1. If the excess of actual value of the real estate over the figures entered in the books and balance sheets had been claimed in the returns for 1918 and 1920, the taxpayer would have been entitled to include the item in invested capital. As I understand, this proposition is not seriously, if at all, disputed.

2. Similarly, within the limits urged in the complaint, the taxpayer would have been entitled to include the item of intangi-
54 bles in invested capital for those years. I think the corporate proceedings, recited in the stipulation, establish that the intangibles were part of the consideration paid for the $490,000 of capital stock when originally issued. As said in Doyle v. Mitchell (247 U. S. 179, 187) and in Isbell Porter Co. v. Commissioner of Internal Revenue (C. C. A. 2, April 7, 1930), the facts, and not the book entries, govern.

3. Whether the 1918 refund claim (Exhibit 3) included the real estate item or the intangibles item depends exclusively upon the significance to be attributed to the statement therein that there existed an abnormal condition in invested capital.

Possibly the two items rest on somewhat different bases. It is manifest that the real estate was under consideration. In a sense, therefore, its value was in issue before the bureau. Nevertheless,

the contention with which we are now engaged with respect to an increase in the real estate value was not specifically mentioned; and certainly the question of whether intangibles might be included in invested capital was not specifically mentioned.

I take it that the regulation of the Secretary of the Treasury in regard to refund applications setting forth under oath "all facts relied on in support of the claim" is valid. (Paul Jones & Co. v. Lucas, 33 Fed. (2d) 907, 908; Art Metal Const. Co. v. United States, 35 Fed. (2d) 379, 380.) I do not believe that the employment of the word "should" instead of the word "shall" makes any difference.

55 The obvious purpose of the regulation was to secure bringing before the commissioner enough to enable him to make a fair decision. What was prescribed was "facts"; not facts alone but "all facts relied upon in support of the claim," and those were required to be "clearly set forth under oath," A taxpayer seeking relief suffered no risk and incurred no penalty through failure to furnish evidence or to make a contention or to give a reason or to cite a provision of law. He was left free to base a suit upon theories or upon arguments or upon statutory interpretations or upon court decisions which he had ignored when he framed his refund claim. He was merely debarred from judicial relief upon facts different from those presented to the administrative officials. The Government, in its consent to be sued, limited recovery to instances in which "all facts" relied on had previously been embodied in a verified refund application. Compliance is a condition precedent to maintaining the action. (Rock Island, etc., R. R. v. United States, 254 U. S. 141, 143.)

Was the assertion that there was an "abnormal" condition in invested capital a full relation of the facts on which the case at bar turns? Was that assertion equivalent to telling the commissioner that invested capital should include a larger sum for real estate or should include a sum for intangibles? I think not. (See Arizona Commercial Mining Co. v. Casey, 32 Fed. (2d) 288, 290.)

I hold therefore that the 1918 refund claim did not set forth "all facts" within the meaning of the regulation.

56 4. The claim for refund of the 1918 taxes was filed in time. Apparently this is not now controverted.

5. If I be right as to the regulation, then, as I see it, there was no waiver. True, some officials had power to waive (Tucker v. Alexander, 275 U. S. 228, 230–1); but neither a ruling by the commissioner that the two items sued on were not proper elements of invested capital nor a temporary admission in the original answer (withdrawn by the amended answer) of the due filing of the 1918 refund claim was sufficient to constitute a waiver. An essential element of waiver is a conscious relinquishment of something that is known. Waiver must be either expressed or implied. Indisputably here there was no express waiver, as there was in Tucker v. Alexander; and I see in

the proof no warrant whatever for inferring a waiver. (See Arizona Commercial Mining Co. v. Casey, 32 Fed. (2d) 288, 291; Ritter v. United States, 19 Fed. (2d) 251, 252.)

6. Plainly, and I believe concededly, the 1920 refund claim (Exhibit 13) included both the real estate and the intangible items.

7. Within the time available for consideration, I have been unable to discover in the confusing phraseology of section 284 of the revenue act of 1926 (26 U. S. C. A., sec. 1065), or elsewhere, any provision which brings the 1920 refund application within the exceptions mentioned in the Revised Statutes, section 3228 (26 U. S. C. A.,
57 sec. 157), to the four years' period of limitations prescribed thereby. Failure of the answer to raise the issue is immaterial, because the burden is on the taxpayer to show affirmatively that the refund application was seasonably filed. (United States v. Richards, 27 Fed. (2d) 284.)

Unless agreed on, settle judgment, including findings, in accordance with the foregoing, on five days' notice.

Dated June 27, 1930.

FRANCIS G. CAFFEY, *U. S. D. J.*

58 In United States District Court

[Title omitted.]

Memorandum, Caffey, J., dated November 5, 1930

I have examined the briefs and the authorities cited. I have considered the findings proposed. I have also studied the questions raised and have formed some tentative impressions. Yet, I am somewhat uncertain what is the true significance of what is embraced in paragraph 7 of my memorandum of June 27, 1930, brought up on reargument. Since that memorandum was filed, the issue and the proof have so far passed out of mind that I feel that I can not now fairly dispose of the matters presented without going again over the entire record. If counsel will send me all the papers, including their memoranda, preferably in the form previously furnished, at the first opportunity I will again review the case.

Dated, November, 5, 1930.

(Sgd.) FRANCIS G. CAFFEY, *U. S. D. J.*

59 In United States District Court

[Title omitted.]

Memorandum, Caffey, J., dated November 10, 1930

This memorandum will deal only with taxes of 1920. It will discuss only refunds, as distinguished from credits. Accordingly, references to statutes hereafter, unless otherwise stated, will be confined to portions which apply to refunds of taxes of that year. In the inter-

est of brevity the Revised Statutes will be cited by giving merely the section numbers thereof.

I have reexamined all papers submitted pursuant to my memorandum of November 5. As I understand, the parties now stipulate that on May 6, 1926, the plaintiff filed with the Commissioner of Internal Revenue (1) a waiver of the taxpayer's right to have its taxes determined and assessed within the statutory time prescribed therefor and (2) a claim for refund. I say that this is my understanding, because to date the matter rests entirely on oral statements recently made by counsel at my chambers, reiterated or implied in their
60 briefs. The claim for refund (Exhibit 13) was put in evidence at the trial; but no waiver was then produced, although on the refund claim there is an entry (apparently in pencil) as follows: "Waiver dated 5–5–26 on file."

In view of the above, for the purpose of disposing of what is presently before me, I shall assume that it is undisputed, and that it is agreed that it shall be taken as part of the record, that both a waiver and a refund claim were duly filed with the commissioner on May 6, 1926. It may be remarked also that if the facts be as I have set out, then even at this late stage the admission on the record that the two papers were filed on the date stated merely saves the trouble of reopening the case so as to permit formal proof to that effect.

The sole question raised by the plaintiff is whether paragraph 7 of my memorandum of June 27, 1930, should be modified.

As already indicated, when I wrote the June memorandum there was no warrant for finding that a waiver had been filed. It is true that on Exhibit 13 there was a notation (by some undisclosed person) about a waiver; but, apart from that not having been called to my attention, it seems to me insufficient as evidence. I still feel that, without a showing of waiver, I should adhere to my first memorandum. (See Porter v. United States, 27 Fed. (2d) 882, 884.) If so, then all that remains for consideration is whether addition of proof of the waiver changes the result.

The issue turns on the condition of the law as it was amended by the revenue act of 1926. That is conceded, I believe, by
61 both sides. There are three relevant provisions. I shall recite and comment on such portions only of these provisions as seem to me relevant.

1. Section 3226 (26 U. S. C. A., sec. 156; 44 Stat. 116, sec. 1113–a) prohibits maintenance of a suit for the recovery of a wrongfully collected tax until a claim for refund has been filed. It also expressly requires that the claim shall be filed "according to the provisions of law in that regard." Those provisions are to be found in section 3228 or in other laws thereby extended to the subject.

2. Section 3228 (26 U. S. C. A., sec. 157; 44 Stat. 115, sec 1112), in subdivision (a), requires that, except as otherwise specified therein, refund claims be presented to the commissioner within four years next after payment of the tax. Among the exceptions, and the only

exception pertinent for examination here, is that contained in section 284 of the revenue act of 1926. Subdivision (a), after the passage of the revenue act of 1926, included a clause as follows:

"All claims for the refunding of any internal revenue tax alleged to have been erroneously * * * collected * * * must, except as provided in sections 284 * * * of the revenue act of 1926, be presented to the Commissioner of Internal Revenue within four years next after the payment of such tax."

62 Mere inspection of the quoted words makes it manifest that, within the meaning of the filing requirement in section 3226 of the Revised Statutes, "the provisions of law in that regard" are that the refund claim be lodged with the commissioner either within four years after payment of the tax or in compliance with the terms, if applicable, of section 284 of the revenue act of 1926.

The tax was paid in 1921. The refund claim was presented in 1926. It is plain therefore that the presentation was not within the four years' period. Did that period govern? Obviously it did unless section 284 of the 1926 act exempted plaintiff from it. Whether plaintiff was exempted is the issue on which exclusively a solution depends. If, however, section 284 does fit the case at bar, then clearly section 3228 relieved plaintiff from the obligation to present to the commissioner its refund claim within four years next after payment of the tax. Unless that were so, the phrase therein, "except as provided in sections 284 * * * of the revenue act of 1926," would be completely deprived of significance.

3. In subdivision (b) of section 284 of the revenue act of 1926 (26 U. S. C. A., sec. 1065; 44 Stat. 66) there are very explicit exceptions from the operation of the four years' period. Among these is included the exception created by and defined in subdivision (g) of the same section. In the latter, in substance, it is said that if a taxpayer shall (1) on or before June 15, 1926, file a waiver and (2) on or before April 1, 1927, file a refund claim, then the refund to which he may show himself entitled shall be made. The exact language employed on the point is this:

63 "If the taxpayer has, on or before June 15, 1926, filed such a waiver in respect of the taxes due for the taxable year 1920 * * *, then such * * * refund relating to the taxes for the taxable year 1920 * * * shall be * * * made if claim therefor is filed on or before April 1, 1927, or within four years from the time the tax was paid."

The taxpayer was thus afforded two alternatives—either (1) to file a waiver by June 15, 1926, and file a refund claim within four years following payment of the tax, or (2) to file the waiver by June 15, 1926, and then on or prior to April 1, 1927, file a refund claim.

Inasmuch as plaintiff filed both documents (the waiver and the refund claim) preceding the prescribed dates, it has brought itself within the exception embraced in subdivision (g) and, accordingly, has thereby relieved itself from the duty to file a refund claim within

four years next after paying the tax as a prerequisite to maintaining the suit.

To summarize: By force of section 3226, it is a condition precedent to the maintenance of suit that a refund claim be filed "according to the provisions of the law in that regard." By force of subdivision (a) of section 3228, as well as of subdivision (b) (1) of section 284 of the revenue act of 1926, the suit must fail unless either (as did not happen) the refund claim was filed within four years after payment of the tax or (as did occur), by force of subdivision (g) of section 284, a waiver was filed on or before June 15, 1926, and a refund claim was filed on or before April 1, 1927.

64 Inasmuch as subdivision (a) of section 3228, after the passage of the revenue act of 1926, expressly excepted from the operation of the four years' period of limitation any case provided for in section 284 of the revenue act of 1926 and subdivision (b) of section 284 of the revenue act of 1926 expressly excepted from the operation of the four years' period of limitation cases, covered by subdivision (g) of that section, in which a taxpayer by June 15, 1926, filed a waiver and by April 1, 1927, filed a refund claim, I see no escape from holding that the present action, so far as concerns the 1920 taxes, is not barred by limitations.

The argument of the Government is that section 284 of the act of 1926 is only administrative; that it merely enables the commissioner, in his discretion, to grant refunds, without conferring any right upon or affecting any remedy of the taxpayer. This contention is based on the premise that the statutes as they stood after the enactment of the revenue act of 1926 were identical in effect with, and the position is sought to be sustained by citation of cases involving, section 252 of the revenue act of 1921 or that section as amended March 4, 1923, construed in conjunction with section 3228 as it was then framed; but I think that neither section 252 nor either case relied on (J. H. Williams & Co. v. United States, D. C. E. D. N. Y., March 25, 1930, unreported; Jonesboro Grocer Co. v. United States, 66 Ct. Cl. Rep. 320) has any application. Moreover, if these court decisions should be deemed to mean that the statutes here involved ought to lead

65 to the same consequences as such decisions attribute to the earlier statutes there discussed, I should regard them as wrong and, in the absence of their approval by controlling authority, I would decline to follow them.

In the first place, it seems to me sufficient to say that, while in the respects material now, section 3226 as reenacted in 1921 (42 Stat. 315) or as amended in 1923 (42 Stat. 1503) was the same as it was after the revenue act of 1926, yet section 3228 was worded in 1921 and 1923 (42 Stat. 314) contained no exception, made no reference to any other provision of law and unqualifiedly limited to four years next after payment of the tax the time for presenting a refund claim therefor to the commissioner. So also section 252 of the revenue act of 1921 (42 Stat. 268), as well as that section as amended in 1923

(42 Stat. 1504), provided "that if, upon examination of any return" for certain designated years, it appear that an amount of tax has been paid "in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess" shall be credited against any taxes "then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer: Provided, That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer." It is believed that the differences between the two sets of statutory provisions—

66 those preceding and those following the enactment of the revenue act of 1926—prevent the one from shedding light on the meaning of the other and render the court decision construing the earlier statutes inapplicable to the interpretation of the later statutes.

It may well be conceded that unless section 252 were limited to administrative funds, there would, in the absence of its being mentioned in section 3228, be a conflict between the two sections. On the principle of avoiding conflict in statutory language when possible, it may be admitted that confining section 252 to administrative funds was justified. Here, however, the situation is wholly altered. After 1926, section 3228 did refer to section 284. It was specifically said in the former that the filing of refund claims within the four years' period should not be required in the cases of taxpayers who complied with section 284 by filing waivers and refund claims preceding the dates therein fixed therefor.

Again, employment in section 252 of the opening words "upon examination of any return" lends support to the Government's insistence that the section was designed only to permit overpayments to be refunded when discovered by the commissioner on his scrutiny of the face of the returns. It will be noted, however, that section 284 is not so limited; on the contrary, that section definitely provides for claims initiated and urged by taxpayers themselves.

Lastly, on this aspect, in the 1923 amendment to section 252 (42 Stat. 1505) there is a proviso relating to the filing of both waivers and refund claims. This, however, apart from other differences in its phraseology from section 284, applies only to 1917 taxes.

67 The taxes dealt with in the Williams case, supra, were for 1918, and hence a decision in that case contains nothing with respect to this particular proviso. Likewise, the Jonesboro case, supra, does not mention the proviso. The consequence is that the only part of the 1923 amendment to section 252 which has any similarity even to section 284, with which we are now concerned, was not construed by either of the decisions cited by the Government.

In the second place, sections 3226, 3228, and 284, all alike, have to do with filing. Section 3228 uses the word "presented," but plainly in the sense of "filing." I conceive of no reason why a regulation by

section 284 of filing should be excluded from, while a regulation by section 3228 of filing is included in, the "provisions of law in that regard" mentioned in section 3226.

Filing as a prerequisite to suit rests on, and is established by, section 3226. That section leaves the method of filing to be ascertained from other "provisions of law." When the provisions outside of section 3226 are consulted, it is found that they are embraced as much in section 284 as in section 3228. It would nullify a part of section 3228 if account were not taken of section 284. It would equally nullify subdivision (g) of section 284 if the filing of a refund claim by April 1, 1927, were not deemed timely when it had been preceded by a waiver filed in advance of June 15, 1926. The two sections stand on the same footing. I discover no room or occasion, or even excuse, for narrowing the field of operation of section 284 so as, after the revenue act of 1926, to continue a system of administrative refunds, theretofore prevailing under differently worded legislation—legislation which was superseded in 1926—and so as, subsequent to 1926, to prevent, on the ground of delay, what may be called court refunds to taxpayers who have filed waivers and refund claims in strict conformity with the new laws brought into being in 1926.

68

My conclusions, therefore, are that (1) on the facts before me at the time of my first memorandum, paragraph 7 was correct; (2) on those facts supplemented by the new fact with respect to the filing of a waiver, the four years' period of limitations does not apply and plaintiff's refund claim was filed seasonably.

In event counsel do not agree on the findings, settle them on three days' notice. In the meanwhile it will be convenient for the papers to remain at my chambers; but they will be available to either side and, if needed in preparing the proposed findings, may be withdrawn.

Dated, November 10, 1930.

FRANCIS G. CAFFEY, *U. S. D. J.*

69 In United States District Court

[Title omitted.]

Memorandum, Caffey, J., dated November 15, 1930

Since the filing of my memorandum of November 10, the defendant has submitted a supplemental memorandum, which is in the nature of an application for a rehearing. I have been carefully over it.

Except in the two respects mentioned below, I have already dealt with every argument now advanced by the defendant.

1. Fox v. Edwards (287 Fed. 669) is cited. It is to be noted, however, that the action there was against a collector, whereas the case here is against the Government. In dealing with section 252 of the revenue act of 1918, Judge Rogers (p. 673) explicitly de-

clared that it was wholly without effect upon a suit against the collector. He furthermore (p. 674) disclaimed expressing any opinion as the the bearing of the section upon a suit against the United States.

70 2. Section 284 of the revenue act of 1926 (44 Stat. 66) follows, as the defendant says, the subtitle of "credits and refunds." For reasons which I assigned in United States v. Mouyas (42 Fed. (2d) 743), at pages 744–5, I do not feel that the employment of this subtitle is of any significance whatsoever in the ascertainment of the meaning of the section.

I accordingly adhere to my November 10 memorandum.

Dated, November 15, 1930.

FRANCIS G. CAFFEY, *U. S. D. J.*

71 In United States District Court

[Title omitted.]

Petitioner's findings of fact and conclusions of law

FINDINGS OF FACT

1. Petitioner, Henry Prentiss & Company, Inc., is a corporation organized and existing under the laws of the State of New York, with its principal place of business in the city of New York.

Allowed.

2. On or about June 16, 1919, petitioner filed its income and profits tax return for the year 1918, showing a total income and profits tax of $535,144.20, which was paid by petitioner on June 16, 1919.

Allowed.

3. Subsequent to filing the above-mentioned return and during the year 1920, the Commissioner of Internal Revenue made an additional assessment of tax for the year 1918 in the amount

72 of $119,191.19, and said additional tax was paid by petitioner on December 28, 1920. Allowed.

4. Thereafter the Commissioner of Internal Revenue recomputed the income and profits tax of petitioner for the year 1918, and same was finally determined and fixed by the Commissioner of Internal Revenue at the sum of $644,776.20, and the Commissioner of Internal Revenue refunded to the petitioner the sum of $9,559.19, representing the difference between the tax as finally assessed and the tax theretofore paid. Allowed.

5. On or about March 15, 1920, petitioner filed its income and profits tax return for the year 1919 showing a total income and profits tax of $43,375.24, which was paid by petitioner in installments during the year 1920. Allowed.

6. Thereafter the Commissioner of Internal Revenue recomputed the income and profits tax of petitioner for the year 1919 and the same was finally determined and fixed by the Commissioner of In-

ternal Revenue at the sum of $42,851.67 and the Commissioner of Internal Revenue refunded to petitioner the sum of $523.57, representing the difference between the tax as finally assessed and the tax theretofore paid. Allowed.

7. On or about March 15, 1921, petitioner filed its income
73 and profits tax return for the year 1920 showing a total income and profits tax of $94,249.50, which was paid by petitioner in installments as follows: $23,562.37 on March 17, 1921, $23,562.37 on June 15, 1921, $23,562.38 on September 16, 1921, and $23,562.38 on December 15, 1921. Allowed.

8. Thereafter the Commissioner of Internal Revenue recomputed the income and profits tax of petitioner for the year 1920 and the same was finally determined and fixed by the Commissioner of Internal Revenue at the sum of $92,265.40, and the Commissioner of Internal Revenue refunded to petitioner the sum of $1,984.10, representing the difference between the tax as finally assessed and the tax theretofore paid. Allowed.

9. On or about the 1st day of September, 1916, petitioner purchased all of the business, property and assets, including name, good will, contracts, and rights of every character and description of Prentiss Tool & Supply Company, a New York corporation, subject to the debts of said corporation, and said property so purchased was bona fide paid in to petitioner on September 1, 1916, for stock of petitioner of the par value of $490,000, at the time of such purchase; said stock consisted of 4,900 shares of the par value of $100 each. Allowed.

10. The actual cash and the actual cash value of the tangible
74 property other than cash, and of name, good will, contracts, and rights of every character and description so bona fide paid in to petitioner for said $490,000 par value of stock of petitioner at the time of such purchase was $1,352,837.74 of which the actual cash and actual cash value of tangible property other than cash amounted to $1,052,837.94 and the actual cash value of name, good will, contracts, and rights of every character and description amounted to $300,000. Allowed.

11. 3,812 shares of stock of the par value of $381,200 was issued by petitioner for the cash and tangible properties other than cash paid in to petitioner, and 1,088 shares of stock of the par value of $108,800 was issued for the intangible properties paid in for said stock. Allowed.

12. The total stock of petitioner outstanding on March 3, 1917, amounted to 5,000 shares of the par value of $500,000. Allowed.

13. The actual cash and the book value of the tangible property other than cash so paid in to petitioner and for which said stock was issued amounted to $1,006,466.66 at the time of such purchase. Such book value was $46,371.08 less than the actual cash value of such property. Said difference in book value and actual cash value was

represented by a certain piece of real estate located in Jersey
75 City, New Jersey, and included in the property paid into petitioner for said stock September 1, 1916. Said real property was carried on the books of the Prentiss Tool & Supply Company and entered on the books of petitioner in the sum of $34,628.92; the actual cash value of said real estate on September 1, 1916, the time it was paid into petitioner, was $81,000, divided as follows: Land value $23,000 and building value $58,000. **Allowed.**

14. The Commissioner of Internal Revenue in computing the paid in surplus of petitioner for the purposes of determining the invested capital of petitioner for each of the years 1918, 1919, and 1920 included cash and all tangibles other than cash at actual cash value, except in the case of said real estate. Said real estate was included in paid-in surplus at book value or at $46,371.08 less than its actual cash value. Allowed.

15. The Commissioner of Internal Revenue in computing invested capital of petitioner for each of the years 1918, 1919, and 1920 did not include therein any amount for name, good will, contracts, or for any intangible property. Allowed.

16. It was stipulated between the parties that if petitioner is entitled to the inclusion in invested capital for any of the years 1918, 1919, and 1920 of an amount on account of intangible property paid in for stock of petitioner, that amount shall be fixed at $107,500. Allowed.

76 17. Petitioner duly filed a claim for refund of income and profits taxes paid by petitioner for the year 1918. **Disallowed.**

18. Said claim for refund was prepared on the form for such refund claims furnished by the Commissioner of Internal Revenue and then in common use and was duly executed by petitioner. Such claim is plaintiff's Exhibit 3, and is made a part hereof by reference. Disallowed.

19. Thereafter the Commissioner of Internal Revenue allowed the petitioner additional time to furnish information in support of the said claim for refund, and oral hearings were had before the commissioner and the Solicitor of Internal Revenue, the last of which was on April 12, 1926. Disallowed.

20. The Commissioner of Internal Revenue rejected and disallowed petitioner's claim for refund. Allowed.

21. Petitioner did not file in the office of the Commissioner of Internal Revenue a claim and demand for refund of income and profits taxes paid by petitioner for the year 1919. Allowed.

22. On the 6th day of May, 1926, petitioner filed a claim and
77 demand for refund in the sum of $9,113.48 of income and profits taxes paid by petitioner for the year 1920.

23. On the 6th day of May, 1926, petitioner filed with the said claim for refund a waiver of its right to have the taxes due for the

taxable year 1920 determined and assessed within the time prescribed by law under any then existing or prior revenue acts. Allowed.

24. Said claim and demand for refund and said waiver were respectively prepared on the forms for refund claims and waivers furnished by the Commissioner of Internal Revenue and then in common use and was duly executed. Allowed.

25. By letter dated September 25, 1926, which is plaintiff's Exhibit 14, and made a part hereof by reference, the Commissioner of Internal Revenue advised petitioner that said refund claim was rejected and no amount on account thereof has been refunded to petitioner. Allowed.

26. The Commissioner of Internal Revenue considered said claim for refund on the merits and did not at any time claim that the said claim for refund was not filed within the time provided by law. Disallowed.

78 27. This action was commenced prior to two years after the denial and rejection of the said claims for refund for the years 1918 and 1920 and more than six months after the filing thereof. Allowed.

CONCLUSIONS OF LAW

1. On account of intangible property bona fide paid into petitioner for stock of petitioner of a par value in excess of $107,500, section 326 of the revenue act of 1918 entitled the petitioner to have included in its invested capital for each of the years 1918, 1919, and 1920 the sum of $107,500 in excess of the amount heretofore allowed petitioner as invested capital for each of said years. Allowed.

2. On account of the excess actual value of tangible property over the book value thereof section 326 of the revenue act of 1918 entitled the petitioner to a paid-in surplus of $46,371.08 in excess of the paid-in surplus heretofore allowed and found by the Commissioner of Internal Revenue and used by the commissioner in computing invested capital of the petitioner for each of the years 1918, 1919, and 1920. Allowed.

3. In computing the invested capital of petitioner for each of the years 1918, 1919, and 1920, depreciation should be charged against the actual value of said building paid in to petitioner on
79 September 1, 1916, at the rate of three per cent per annum, computed from September 1, 1916, and adjustments in invested capital and income as a result of such depreciation as compared with the amounts heretofore used by the Commissioner of Internal Revenue should be made for each of said years. Allowed.

4. By reason of the failure of the Commissioner of Internal Revenue to include said sum of $107,500 in invested capital of petitioner, and by reason of the failure of the Commissioner of Internal Revenue to allow petitioner a paid in surplus of $46,371.08 and to compute invested capital of petitioner for each of the years 1918, 1919, and 1920 in accordance therewith, the invested capital of petitioner

for each of said years was under-stated and the amount of the income of petitioner was incorrectly determined, and petitioner was required to and did pay income and excess-profits taxes for each of said years in excess of the amount legally assessable against it.

Allowed.

5. The amount of income and excess-profits taxes legally assessable against petitioner for the year 1918 was $632,673.25 and the Commissioner of Internal Revenue has assessed petitioner and petitioner has paid for taxes for such year the sum of $12,102.95 in excess thereof. Allowed.

6. The amount of income and excess-profits taxes legally
80 assessable against petitioner for the year 1919 was $40,499.88 and the Commissioner of Internal Revenue has assessed petitioner and petitioner has paid for taxes for said year the sum of $2,351.79 in excess thereof. Allowed.

7. The amount of income and excess-profits taxes legally assessable against petitioner for the year 1920, if computed with the benefit of the over-assessments hereinbefore found to have been made for the years 1918 and 1919, is $83,630.12 and the Commissioner of Internal Revenue has assessed petitioner and petitioner has paid for taxes for said year the sum of $8,635.28 in excess thereof. Disallowed.

8. The amount of income and excess-profits taxes legally assessable against petitioner for the year 1920, if computed without the benefit of the over-assessments found to have been made for the years 1918 and 1919 is $82,970.05 and the Commissioner of Internal Revenue has assessed petitioner and petitioner has paid for taxes for said year the sum of $7,975.21 in excess thereof. Disallowed.

9. In computing the invested capital and income and excess-profits tax of petitioner for the year 1920 petitioner is entitled to the benefits of over-assessments for the years 1918 and 1919. Disallowed.

10. The refund claim filed by petitioner for the recovery of
81 taxes claimed to have been illegally assessed for the year 1918 complied with the statutes of the United States and with the regulations of the Secretary of the Treasury, prescribed pursuant to said statutes and was sufficient to entitle the petitioner to recover the taxes wrongfully and erroneously assessed against it for said year. Disallowed.

11. The Commissioner of Internal Revenue waived his right to say that the said claim for refund was not in compliance with the statutes of the United States and with the regulations of the Secretary of the Treasury prescribed pursuant to said statutes. Disallowed.

12. The Commissioner of Internal Revenue was estopped to claim that the said claim for refund was not in compliance with the statutes of the United States and with the regulations of the Secretary of the Treasury prescribed pursuant to said statutes. Disallowed.

13. The admission in the answer in this action that the said claim for refund was pursuant to the statutes of the United States and to the regulations of the Secretary of the Treasury prescribed pursuant

to said statutes is binding upon the defendant and relieved the petitioner of the burden of proving affirmatively that the said claim for refund was in compliance with the statutes of the United
82 States and with the regulations of the Secretary of the Treasury prescribed pursuant thereto. Disallowed.

14. The claim for refund for the recovery of taxes claimed to have been illegally assessed for the year 1920 was filed within the time prescribed by the statutes of the United States. Allowed.

15. The admission by the defendant in its answer that the claim for refund for 1920 was duly filed pursuant to the statutes of the United States is binding upon the defendant and relieved the petitioner of the burden of proving affirmatively that the said claim for refund was duly filed pursuant to the statutes of the United States. Disallowed.

16. Petitioner is entitled to judgment in the sum of $12,102.95 on account of taxes paid by it for the year 1918 in excess of the amount legally assessable against petitioner, together with interest on said sum from December 28, 1920. Disallowed.

17. Petitioner is entitled to judgment in the sum of $7,975.21 on account of taxes paid by it for the year 1920 in excess of the amount legally assessable against petitioner, together with interest on said sum from August 1, 1921. Allowed.

FRANCIS G. CAFFEY.

83 In United States District Court

[Title omitted.]

Defendant's findings of fact and conclusions of law

The above-entitled action having been regularly on the calendar of this court and having come on to be heard on the 28th day of February, 1930, and the plaintiff having appeared by Jeffery and Redmond, its attorneys, Joseph F. Murray and William P. Jeffery, of counsel, and the defendant having appeared by Charles H. Tuttle, Esq., United States attorney, Leon E. Spencer, assistant United States attorney, of counsel, and the parties having presented their proofs, now after hearing Joseph F. Murray, counsel for the plaintiff, and Leon E. Spencer, counsel for the defendant, and the court having made and filed its written opinion, and due deliberation having been had, I decide and find as follows:

I. That at all the times hereinafter mentioned, and since August 17, 1916, the plaintiff was and still is a corporation organized under the laws of the State of New York and having its principal place of business in the city of New York. Allowed.

84 II. That the plaintiff on June 16, 1919, filed its income and profits tax return for the calendar year 1918, and on June 16, 1919, paid to the collector of internal revenue for the second district of New York the tax shown due by said return in the sum of $535,144.20. Allowed.

III. That during the year 1920 an additional assessment in the amount of $119,191.19 was levied against the plaintiff on account of income and profits taxes for the calendar year 1918; that the said amount was paid by the plaintiff to the collector of internal revenue for the second district of New York on December 28, 1920.

Allowed.

IV. That of the aforesaid amounts paid as an income and profits tax for 1918 by the plaintiff, there was refunded to the plaintiff pursuant to the direction of the Commissioner of Internal Revenue the sum of $9,559.19. Allowed.

V. That on March 25, 1924, the plaintiff filed a claim for refund with the Commissioner of Internal Revenue seeking the return of $200,000 income and profits taxes paid for the calendar year 1918 on grounds as stated in said claim for refund (plaintiff's Exhibit 3).

Allowed.

That the plaintiff was entitled to relief under sections 327 and 328 of the revenue act of 1918. Disallowed.

85 VI. That on July 16, 1925, the Commissioner of Internal Revenue rejected the plaintiff's claim for refund filed for 1918, signing a rejection schedule, No. 21937, on September 3rd, 1926, and asserted that the plaintiff was not entitled to any relief under sections 327 and 328 of the revenue act of 1918. Allowed.

VII. That the plaintiff on March 17, 1921, filed its income and profits tax return for the calendar year 1920, and the tax shown due on said return was paid by the plaintiff to the collector of internal revenue for the second district of New York, as follows:

March 17, 1921	$23,562.37
June 15, 1921	23,562.37
September 15, 1921	23,562.38
December 15, 1921	23,562.38

Allowed.

VIII. That on May 6, 1926, the plaintiff filed a claim for refund with the Commissioner of Internal Revenue seeking the return of $9,113.48 income and profits taxes paid for the calendar year 1920 on grounds as stated in said claim for refund (plaintiff's Exhibit 13); that the plaintiff was entitled to include in invested capital under section 326 of the revenue act of 1918 an additional sum of $180,670.08. This sum of $180,670.08 was to include an additional value for tangibles in the sum of $55,670.08 and a value for intangibles in the sum of $125,000.00. Allowed.

86 IX. That on September 26, 1926, the Commissioner of Internal Revenue rejected the plaintiff's claim for refund filed for 1920 on Schedule 7874, dated October 13, 1926, and asserted that the plaintiff was not entitled to include in its invested capital for the year 1920 any additional sum for tangibles or any sum whatsoever for intangibles. Allowed.

X. That the plaintiff was organized and incorporated on August 17, 1916, with an authorized capital stock of $10,000 par value.

Allowed.

XI. That the 100 shares of the stock of the plaintiff was on August 17, 1916, issued to Marshall Prentiss, George L. Wilson, and Charles A. Goodspeed in exchange for 100 shares of stock of Atchison Topeka and Santa Fe Railway Company having a par value of $10,000. Allowed.

XII. That on August 25, 1916, Henry Prentiss & Company, Inc., increased its authorized capital stock from $10,000 to $500,000 consisting of 5,000 shares of the par value of $100 each. Allowed.

XIII. That on September 1, 1916, Henry Prentiss & Company acquired all the assets both real and personal of the Prentiss Tool & Supply Company and in exchange and payment therefor
87 issued to the Prentiss Tool & Supply Company 49,000 shares of its stock of the par value of $100 per share. Allowed.

XIV. That the value of the tangible property purchased by Henry Prentiss and Company, Inc., on September 1, 1916, from the Prentiss Tool and Supply Company exceeded the par value of the stock issued therefor. Allowed.

XV. The statement of the closing balance sheet of the Prentiss Tool & Supply Company as of August 31, 1916, did not include any value for intangibles. Allowed.

XVI. The statement of the opening balance sheet of Henry Prentiss & Company, Inc., showing the assets acquired from Prentiss Tool & Supply Company, included no value whatsoever for intangibles. Allowed.

XVII. That a part of the tangible property acquired by the Henry Prentiss & Company, Inc., at the time of its organization from the Prentiss Tool & Supply Company, consisted of certain land and a warehouse located in Jersey City, New Jersey. Allowed.

XVIII. That the Commissioner of Internal Revenue, in
88 computing the income and excess-profits and war-profits taxes due from plaintiff for each of the years ending December 31, 1918, and December 31, 1920, included in the invested capital of plaintiff for each of said years only the sum of $34,628.92 as the actual value of said real estate. Allowed.

XIX. That the actual value of said real estate on September 1, 1916, was $81,000.00, divided as follows: Land value $23,000.00, and building value of $58,000.00. Allowed.

XX. That in computing the income and excess-profits and war-profits taxes due from plaintiff for each of the years ending December 31, 1918, and December 31, 1920, the Commissioner of Internal Revenue did not include in, and as invested capital, any sum for intangible property, including name, good will, contracts, and rights. Allowed.

XXI. That the actual value of intangible property acquired by the plaintiff, including name, good will, contracts, and rights, was on September 1, 1916, in excess of the sum of $300,000. Allowed.

XXII. That the claim for refund filed with the Commissioner of Internal Revenue seeking the return of $200,000 income and profits

taxes paid for the calendar year 1918 by the plaintiff
89 did not state the same grounds and/or facts as are now urged in the present suit. Allowed.

XXIII. That the plaintiff filed its claim for refund, seeking the return of 1920 income and profits taxes paid, more than four years after the payment of such tax. Allowed.

XXIV. The net income of the plaintiff for the year 1918 was $949,333.74. Allowed.

XXV. The plaintiff's invested capital for the year 1918 was $1,566,019.05 Disallowed.

XXVI. The net income of the plaintiff for the year 1920 was $381,918.32. Allowed.

XXVII. The plaintiff's invested capital for the year 1920 was $1,625,862.80. Disallowed.

From the foregoing findings of fact, I have reached the following conclusions of law:

1. That the plaintiff's claim for refund seeking the recovery of 1918 income and profits taxes does not support in anywise the present suit. Allowed.

90 2. That the plaintiff's claim for refund seeking the recovery of 1920 income and profits taxes was not duly filed as provided by law and statutes applicable thereto. Disallowed.

2A. The waiver filed by the plaintiff for the year 1920, on May 5, 1926, pursuant to section 278 of the revenue act of 1926, did not extend the time within which the plaintiff could file a claim for refund for the calendar year 1920 so as to permit a suit to be brought in court as a result of its disallowance. Disallowed.

2B. The rejection of the plaintiff's claim for refund seeking the return of a part of its income and profits taxes paid for the calendar year 1920 did not entitle the plaintiff to bring an action in the District Court for the relief requested in said claim for refund. Disallowed.

3. The plaintiff was not entitled to inclusion in invested capital for the calendar years 1918 or 1920 of any amount for intangibles in the computation of its Federal income and profits tax for those years. Disallowed.

4. At the time of the organization of Henry Prentiss & Company, Inc., and/or prior to March 3, 1917, no intangible property
91 was bona fide paid in for any of the 5,000 shares of stock of Henry Prentiss & Company, Inc. Disallowed.

5. The defendant is entitled to judgment dismissing the petition on the merits, together with the costs and disbursements of this action. Disallowed.

FRANCIS G. CAFFEY, *U. S. D. J.*

Findings and conclusions respectfully allowed or disallowed this day in accordance with the notations made by me in the margin.

January 20, 1931.

FRANCIS G. CAFFEY, *U. S. D. J.*

92 In United States District Court

[Title omitted.]

Petitioner's exceptions to findings of fact and conclusions of law

I. The petitioner, Henry Prentiss & Co., Inc., hereby excepts to the defendant's findings of fact numbered VI and XXII, allowed by the court herein.

II. The petitioner further excepts to the court's refusal to find petitioner's proposed findings of fact numbered 17, 18, 19, and 26.

III. The petitioner further excepts to the court's conclusion of law as submitted by the defendant numbered 1, upon the ground that the evidence shows that the petitioner's claim for refund seeking recovery of 1918 income and profits taxes was in conformity with the statutes of the United States and the regulations of the Secretary of the Treasury.

IV. The petitioner further excepts to the refusal of the
93 court to make conclusions of law numbered 7, 8, 9, 10, 11, 12, 13, 15, and 16, requested by petitioner.

JEFFERY & REDMOND,
Attorneys for Petitioner,
14 Wall Street, New York City.

The above exceptions are allowed.

FRANCIS G. CAFFEY, *U. S. D. J.*

In United States District Court

[Title omitted.]

Defendant's exceptions to findings of fact and conclusions of law

I. The defendant, United States of America, hereby excepts
94 to the petitioner's findings of fact allowed by the court herein numbered five, six, nine, ten, eleven, thirteen, and sixteen.

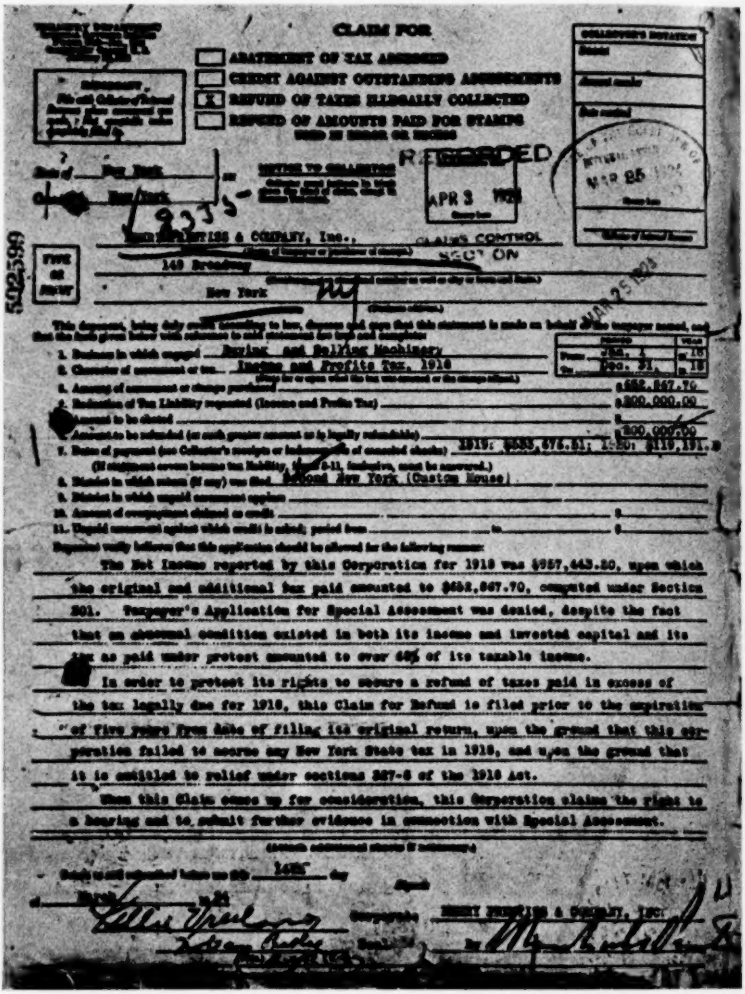
II. The defendant further excepts to the court's refusal to find defendant's proposed findings of fact numbered twenty-five and twenty-seven and so much of five as was disallowed.

III. Defendant further excepts to the court's conclusion of law as submitted by the petitioner, numbered one, upon the ground that there is no evidence to show that good will in any amount was ever bona fide paid in for any shares of stock of the petitioner.

IV. Defendant further excepts to the court's conclusion of law as submitted by the petitioner numbered four, upon the same ground as that set forth in paragraph "III" herein.

V. Defendant further excepts to the court's conclusion of law as submitted by the petitioner, numbered five, upon the ground that there is no evidence to support the same and that it is contrary to and against the evidence.

PETITIONER'S EXHIBIT 3



CLAIM FOR

☐ ABATEMENT OF TAX ASSESSED
☐ CREDIT AGAINST OUTSTANDING ASSESSMENTS
☒ REFUND OF TAXES ILLEGALLY COLLECTED
☐ REFUND OF AMOUNTS PAID FOR STAMPS USED IN EXCESS OR ERROR

RECORDED

APR 3 1923

COLLECTOR'S ENTRIES

APR 25

5025389

TYPE OF PRINT

149 Broadway

New York

JUN 25 1923

Bearing and Rolling Machinery

Income and Profits Tax, 1918

From Jan. 1, 1918
To Dec. 31, 1918

$682,847.70

$300,000.00

$

$300,000.00

1919: $533,676.81; 1920: $119,191.8

Internal Revenue Collector, New York (Custom House)

The Net Income reported by this Corporation for 1918 was $957,443.80, upon which the original and additional tax paid amounted to $682,847.70, computed under Section 301. Taxpayer's Application for Special Assessment was denied, despite the fact that an abnormal condition existed in both its income and invested capital and its tax as paid under protest amounted to over 60% of its taxable income.

In order to protect its rights to secure a refund of taxes paid in excess of the tax legally due for 1918, this Claim for Refund is filed prior to the expiration of five years from date of filing its original return, upon the ground that this corporation failed to accrue any New York State tax in 1918, and upon the ground that it is entitled to relief under sections 327-8 of the 1918 Act.

When this Claim comes up for consideration, this Corporation claims the right to a hearing and to submit further evidence in connection with Special Assessment.

14th day

March, 1923

Corporate name: HENRY PRENTISS & COMPANY, INC.

By

VI. Defendant further excepts to the court's conclusion of law as submitted by the petitioner, numbered six, upon the ground that there is no evidence to support the same and that it is contrary to and against the evidence.

VII. Defendant further excepts to the court's conclusion
95 of law, as submitted by the petitioner, numbered fourteen, upon the ground that there is no evidence to support the same and that it is contrary to and against the evidence.

VIII. Defendant further excepts to the court's conclusion of law as submitted by the petitioner, numbered seventeen, upon the same grounds as stated in the preceding paragraphs hereof.

IX. Defendant further excepts to the refusal of the court to make conclusions of law, as requested by it, numbered two, two–a, two–b, three, four, and five.

ROBERT E. MANLEY,
Acting United States Attorney.

The above exceptions are allowed.

FRANCIS G. CAFFEY, *U. S. D. J.*

96 In United States District Court

[Title omitted.]

Order settling bill of exceptions

Upon the annexed consent and on motion of George Z. Medalie, United States attorney for the Southern District of New York, and on motion of Jeffery & Redmond, attorneys for petitioner, I have signed, settled, and allowed the foregoing, together with the exhibits offered and received in evidence and the plaintiff's and defendant's findings of fact and conclusions of law, with all exceptions taken and filed as petitioner's and defendant's bill of exceptions.

Dated, N. Y., December 29, 1931.

FRANCIS J. CAFFEY, *U. S. D. J.*

Consented to.
JEFFERY & REDMOND,
Attorney for the Petitioner.

Consented to.
GEORGE Z. MEDALIE,
U. S. Attorney,
Attorney for Defendant.

98 *Petitioner's Exhibit 5*

Address reply to Commissioner of Internal Revenue and refer to IT: CA–2118–11.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, May 13, 1924.

HENRY PRENTISS AND COMPANY, INC.,
149 Broadway, New York, N. Y.

SIRS: Reference is made to your claim for refund of 1918 income and profits taxes in the amount of $200,000.00.

Your claim is based upon the contention that accrued New York State taxes should be allowed as a deduction from net income and that relief should be granted under the provisions of sections 327 and 328 of the revenue act of 1918.

No consideration may be given under the provisions of sections 327 and 328 until statutory net income and invested capital are definitely determined. It is therefore necessary that you acquiesce in the net income and invested capital as shown in the revenue agent's report dated March 25, 1920, for the year 1918 or submit exceptions, if any, which you may take thereto. If exceptions are taken,
99 they should be presented in the form of an appeal prepared in accordance with the provisions of Treasury Decision 3492, a copy of which is enclosed.

Whether you acquiesce the net income and invested capital as previously determined to be correct or file a brief or exceptions thereto, it is necessary that all information in connection with your claim for relief under sections 327 and 328 be presented for consideration, for the reason that the committee on appeals and review in a memorandum dated November 23, 1921, denied a similar request.

As it is desired to expedite consideration of your claim, you are requested to submit the information outlined above within twenty days from the date of this letter, referring in your reply to IT: CA–2118–11.

Respectfully,

J. G. BRIGHT,
Deputy Commissioner,
By JOHN G. REMEY,
Chief of Section.

Henry Prentiss & Co., Inc., New York. Recd. May 14, 1924.
Answered by ——— ———.

100 *Petitioner's Exhibit 6*

Address reply to Commissioner of Internal Revenue and refer to IT:CA–2118–11.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, June 23, 1924.

HENRY PRENTISS & COMPANY, INC.,
149 Broadway, New York, N. Y.

SIRS: This will confirm an extension of time until June 27, 1924, which was verbally granted by this office on June 12, 1924, within which to furnish data requested in office letter of May 13, 1924.

In any further correspondence reference should be made to IT:CA–2118–11.

Respectfully,

J. G. BRIGHT,
Deputy Commissioner,
By JOHN G. REMEY,
Chief of Section.

Henry Prentiss & Co., Inc., New York. Recd. Jun. 25, 1924.
Answered by ——— ———.

101 *Petitioner's Exhibit 8*

Address reply to Commissioner of Internal Revenue and refer to IT:E:SM;RCA–A–758.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, Jun. 26, 1925.

HENRY PRENTISS AND COMPANY, INC.,
149 Broadway, New York, N. Y.

SIRS: Reference is made to your letter of June 26, 1924, in which you appeal from the decision of the bureau in denying your corporation relief under sections 327 and 328 of the revenue act of 1918 for the year 1918.

You are advised that a careful review of your case in comparison with representative corporations reveals no abnormality evidenced by gross disproportion between the tax computed without the benefits of sections 327 and 328 and the tax computed by reference to representative concerns specified in section 328.

102 The action of the bureau in denying your appeal for special assessment is, therefore, sustained, and your case is deemed closed.

Respectfully,

C. R. NASH,
Acting Commissioner.

Henry Prentiss & Co., Inc., New York. Recd. June 29, 1925.
Answered by ——— ———.

Petitioner's Exhibit 9

Address reply to Commissioner of Internal Revenue and refer to IT:E:SM-60-D; RCA-A-758.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, July 16, 1925.

HENRY PRENTISS AND COMPANY, INCORPORATED,
149 Broadway, New York, New York.

SIRS: Your claim for refund of $200,000.00 income and excess-profits tax for the calendar year 1918 has been examined.

103 The basis of the claim is an application under the provisions of section 327 for assessment of your profits tax as prescribed by section 328 of the revenue act of 1918.

Under date of June 26, 1925, you were advised that your case revealed no abnormality evidenced by gross disproportion between the tax computed without the benefit of sections 327 and 328 and the tax computed by reference to the representative concerns specified in section 328 and that your case was deemed closed.

In accordance with the above conclusions, your claim will be rejected.

The collector of internal revenue for your district will be officially notified at the expiration of thirty days from the date of this letter of the rejection.

Respectfully,

C. B. ALLEN,
Acting Deputy Commissioner.

Henry Prentiss & Co., Inc., New York. Recd. Jul. 17, 1925.
Answered by ——— ———.

104 *Petitioner's Exhibit 10*

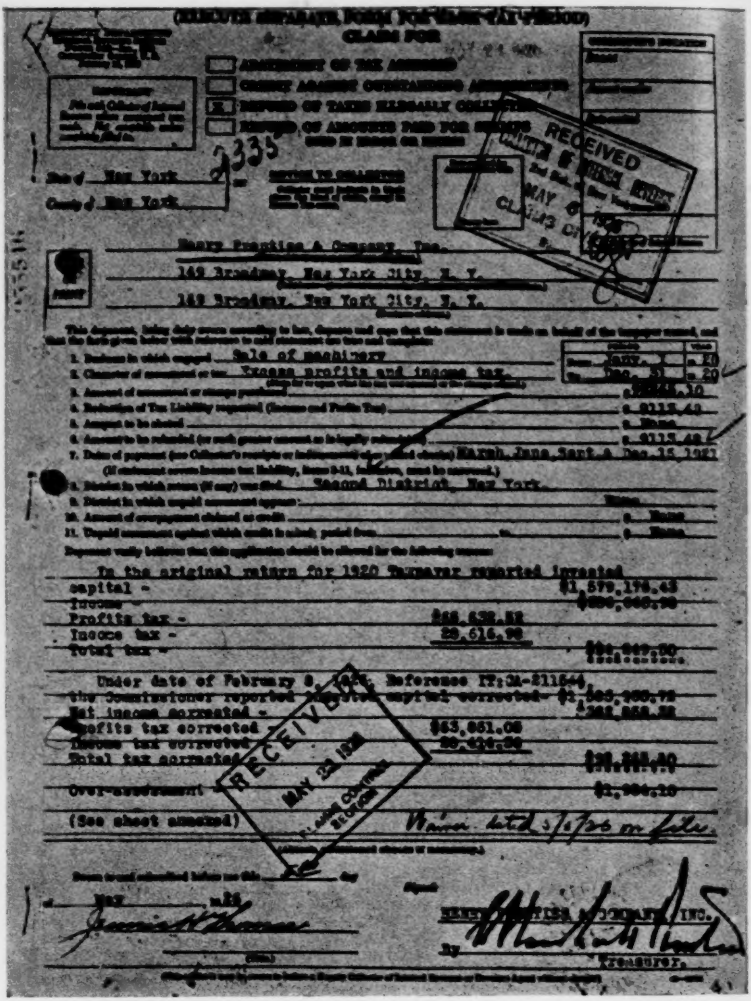
Address reply to Commissioner of Internal Revenue and refer to SOL:R:C1.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, February 23, 1926.

HENRY PRENTISS AND COMPANY, INC.,
149 Broadway, New York, N. Y.

SIRS: You are advised that this office has before it for consideration in connection with your income and profits taxes for 1918 and 1919 your application for special assessment. Some question has arisen as to the denial of special assessment. However, before a final decision is reached you will be granted an opportunity to be heard orally if you so desire. Accordingly you are requested to inform

PETITIONER'S EXHIBIT 13



CLAIM FOR

☐ ADJUSTMENT OF TAX ASSESSED

☐ CREDIT AGAINST OUTSTANDING ASSESSMENTS

☒ REFUND OF TAXES ILLEGALLY COLLECTED

☐ REFUND OF AMOUNTS PAID FOR STAMPS USED BUT SPOILED OR ERRONEOUSLY AFFIXED TO DOCUMENTS

RECEIVED MAY 6 1925 CLAIMS DIVISION

State of New York, County of New York

Henry Prentice & Company, Inc.
149 Broadway, New York City, N. Y.
149 Broadway, New York City, N. Y.

1. Business in which engaged: Sale of machinery
2. Character of assessment or tax: Excess profits and income tax.
3. Amount of assessment or overpayment: $
4. Reduction of Tax Liability requested (Income and Profits Tax): $ 9115.48
5. Amount to be abated: $
6. Amount to be refunded (or such greater amount as is legally refundable): $ 9115.48
7. Date of payment (see Collector's receipts or indorsements on assessed checks): March, June, Sept. & Dec. 15, 1921
8. District in which return (if any) was filed: Second District, New York.
9. District in which unpaid assessment appears:
10. Amount of overpayment claimed as credit: $ None
11. Unpaid assessment against which credit is asked, posted from: $ None

Taxpayer verily believes that this application should be allowed for the following reasons:

In the original return for 1920 Taxpayer reported invested capital - $1,579,178.45
Income - $280,000.00
Profits tax - $68,638.82
Income tax - 20,614.98
Total tax - $89,253.80

Under date of February 8, 1924, Reference IT:AR-211544, the Commissioner reported invested capital corrected - $1,565,000.72
Net income corrected - $265,858.88
Profits tax corrected - $63,851.06
Income tax corrected - 20,414.50
Total tax corrected - $84,265.40

Over-assessment - $5,004.10

(See sheet annexed) Waiver dated 3/5/25 on file.

RECEIVED MAY 24 1926 INCOME TAX UNIT BUREAU

Sworn to and subscribed before me this 4th day of May, 1925

Jessie M. Thompson
(Seal)

HENRY PRENTICE & COMPANY, INC.
By [signature]
Treasurer.

this office within ten days from the date of this letter whether or not you desire such a hearing, otherwise the decision in the matter will be based upon the record as it now stands.

Respectfully,

A. W. GREGG,
Solicitor of Internal Revenue.

Henry Prentiss & Co., Inc., New York. Recd. Feb. 25, 1926.
Answered by ——— ———.

105 *Petitioner's Exhibit 11*

Address reply to the Solicitor of Internal Revenue, Washington, D. C., and refer to initials and number SOL:R:C1.

DEPARTMENT OF JUSTICE,
OFFICE OF THE SOLICITOR OF INTERNAL REVENUE,
Washington, March 3, 1926.

HENRY PRENTISS & COMPANY,
149 Broadway, New York, New York.

SIRS: In response to the request set forth in your letter dated March 2, 1926, for an oral hearing in connection with your income and profits taxes for 1918 and 1919, you are advised that Monday, March 15, 1926, at 10.00 a. m., has been set for such hearing before the review division of the office of the Solicitor of Internal Revenue, in room 5026, Interior Building, Washington, D. C.

Respectfully,

P. C. ALEXANDER,
Assistant Solicitor.

Henry Prentiss & Co., Inc., New York. Recd. Mar. 6, 1926.
Answered by ——— ———.

107 Taxpayer was advised that the case would be forwarded for scheduling, but to date payment of over-assessment has not been received.

On the grounds given below taxpayer claims that its invested capital for 1920 should be recomputed and increased by the sum of $180,670.08.

With such adjustment in invested capital, the profits tax assessable will be	$53,725.51
Income tax assessable	29,426.41
Total tax assessable	83,151.92
Tax originally assessed	$94,249.50
Over-assessment	11,097.58
Amount of over-assessment previously allowed (Treasury Department letter February 8, 1926, reference IT:CA-2115-4)	1,984.10
Additional over-assessment claimed herein	$9,113.48

This claim for increase in invested capital is based upon facts presented and set forth in detail in sworn statement of taxpayer verified April 8, 1926, heretofore submitted to the office of the Solicitor of Internal Revenue in connection with application for relief for years 1918 and 1919 under sections 327 and 328.

A copy of such sworn statement is hereto annexed and made a part hereof.

As appears from such sworn statement, taxpayer on September 1, 1916, issued its stock of the par value of $500,000 for all of the
108 business, property, including contracts, good will, etc., of a predecessor New York corporation, Prentiss Tool & Supply Company. There was no change in interest.

Tangibles appeared on the books of the Prentiss Tool & Supply Company at $938,894.35 and were entered on the books of taxpayer at the same amount.

Actual cash value of tangible acquired for stock was $55,670.08 in excess of such amount. (See pages 8 and 9 of sworn statement and exhibits referred to therein.)

Intangibles—contracts, good will, etc.—did not appear on the books of Prentiss Tool & Supply Company, and no value was entered for same on books of taxpayer.

Actual cash value of intangibles acquired for stock was at least $1,404,384.75. (See schedules following page 15 of sworn statement and also supporting data as to existence and value of intangibles beginning page 11.)

Taxpayer's $500,000 par value stock was issued for both tangibles and intangibles, as appears from resolutions adopted by Prentiss Tool & Supply Company and by taxpayer. (Pages 27 to 31 of sworn statement.) This stock was issued for "business, property, and assets * * * including name, good will, contracts, and rights of every character and description," subject to debts.

In computing invested capital for 1920 taxpayer has not been allowed the actual cash value of intangibles acquired for stock or the excess actual cash value of tangibles so acquired.

109 Under section 326 taxpayer is entitled to have these values included in the computation of invested capital.

Tangibles transferred as per books	$938,894.35
Excess cash value of tangibles	55,670.08
Total actual cash value of tangibles transferred	$994,564.43
Value of intangibles transferred (see schedules following page 15 of sworn statement	1,404,384.75
Total cash value tangibles and intangibles acquired	2,398,949.13
Per cent tangibles to total value	41½%
Per cent intangibles to total value	58½%

58½% or $292,500 par value of the capital stock of taxpayer was issued for intangibles.

Additional invested capital to which taxpayer is entitled under section 326:

Excess value of tangibles	$55,670.08
Intangibles (maximum allowed by law, 25% of $500,000)	125,000.00
Total additional invested capital	$180,670.08

St. Louis Screw Company, 2 B. T. A. 649 at 658.

The same result is produced even though above intangible value is questioned, so long as intangible value of $331,521.47 is recognized. As to this there can be no question.

110 IT:CA:PYA–1–2.

HENRY PRENTISS AND COMPANY, INCORPORATED, *149 Broadway*, New York, New York.

Sirs: Your claim for refund of $9,113.48 tax paid for the year 1920 has been examined.

The basis of this claim is that you are entitled to include in your invested capital a paid-in surplus as at date of incorporation of $180,670.08, of which $55,670.08 is due to the revaluation of real estate based upon an appraisal and the balance to good will and other intangibles not set up on books.

You are advised that in accordance with Treasury Decision 3367 the appraisal can not be accepted for the determination of paid-in surplus, since it is based on opinion evidence of Mr. Ryer and Mr. Delatush and is unsupported by substantiating evidence. You are also advised that no paid-in surplus can be allowed with respect to intangibles.

Your claim will, therefore, be rejected. This rejection will appear officially on the next schedule to be approved by the commissioner.

C. R. NASH,
Assistant to the Comimssioner,
By (Signed) F. R. CLUTE,
Head of Division.

HSG–4.
Rejected. 7874. L. T. schedule.

111 *Petitioner's Exhibit 14*

Address reply to Commissioner of Internal Revenue and refer to IT:CA:PYA–1–2.
(Seal.)

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, Sep. 25, 1926.

HENRY PRENTISS AND COMPANY, INCORPORATED,
149 Broadway, New York, New York.

SIRS: Your claim for refund of $9,113.48 tax paid for the year 1920 has been examined.

The basis of this claim is that you are entitled to include in your invested capital a paid-in surplus, as at date of incorporation, of $180,670.08, of which $55,670.08 is due to the revaluation of real

estate based upon an appraisal and the balance to good will and other intangibles not set up on books.

You are advised that in accordance with Treasury Decision 3367 the appraisal cannot be accepted for the determination of paid-in surplus, since it is based on opinion evidence of Mr. Ryer and Mr. Delatush and is unsupported by substantiating evidence. You
112 are also advised that no paid-in surplus can be allowed with respect to intangibles.

Your claim will, therefore, be rejected. This rejection will appear officially on the next schedule to be approved by the commissioner.

C. R. NASH,
Assistant to the Commissioner,
By F. R. CLUTE,
Head of Division.

Henry Prentiss & Co., Inc., New York. Recd. Sep. 27, 1926.
Answered by ——— ———.

113 *Petitioner's Exhibit 15*

In United States District Court, Southern District of New York

L. 40/387

HENRY PRENTISS & COMPANY, INC., PLAINTIFF

against

THE UNITED STATES OF AMERICA, DEFENDANT

ANSWER

The United States of America, By Charles H. Tuttle, United States attorney for the Southern District of New York, answers the petition and complaint herein, as follows:

First. It denies that it has any knowledge or information sufficient to form a belief as to any of the allegations of the 1 and 12 paragraphs of the complaint.

Second. Admits the allegations of the 2, 3, 4, 5, 8, 9, and 11 paragraphs of the complaint.

Third. It admits that in computing the income and excess-profits and war-profits taxes due from the petitioner for each of the three years ending December 31, 1918, December 31, 1919, and
114 December 31, 1920, the Commissioner of Internal Revenue refused to include in the invested capital of the petitioner the sum of $55,067.08, and also refused to include in invested capital the sum of $1,400,000; except as so admitted, it denies that it has any knowledge or information sufficient to form a belief as to any of the allegations of the 6 paragraph of the complaint.

Fourth. Upon information and belief, denies each and every allegation of the 7 and 10 paragraphs of the complaint.

Wherefore, the United States of America demands judgment dismissing the complaint herein with costs.

CHARLES H. TUTTLE,
United States Attorney for the
Southern District of New York,
Attorney for Defendant

Office and post-office address, U. S. Courts and old P. O. Bldg., Borough of Manhattan.

115 SOUTHERN DISTRICT OF NEW YORK, *ss:*

Samuel C. Coleman, being duly sworn, deposes and says that he is the assistant United States attorney for the Southern District of New York, in charge of the within matter; that he has read the foregoing answer and knows the contents thereof; that the same is true to his own knowledge except as to the matters therein stated to be alleged on information and belief and that as to those matters he believes it to be true; that the reason this verification is made by deponent and not by the defendant is that defendant is a corporation sovereign and body politic.

The sources of deponent's information and the grounds for his belief are records and correspondence of the Bureau of Internal Revenue.

SAMUEL C. COLEMAN.

Sworn to before me this 19th day of October, 1928.

ARMAND CHANKALIAN,
Notary Public, New York Co.

Clerk's No. 307, reg. No. 9163.
Commission expires March 30, 1929.

Defendant's Exhibit A

Exhibit 1

Henry Prentiss and Company, Inc.—Comparative statement of condition as of December 31, 1917 and 1918

	1917			1918			Increase	Decrease
ASSETS								
Property, plant, and equipment:								
Real estate, warehouse, Jersey City		$34,628.92			$34,628.92			
Warehouse equipment		2,900.77			2,902.57		$1.80	
Warehouse fixtures		1,506.86			1,564.36		57.50	
New York office fixtures		3,071.93			2,279.23			$792.70
Boston office fixtures		378.75			367.75			11.00
Buffalo, Rochester, and Syracuse office fixtures		2,893.35			2,799.35			
Automobile and truck account					4,882.27		4,882.27	
Total property, plant, and equipment			$45,380.58			$49,424.45	4,043.87	
Securities owned (Schedule A):								
Securities of other companies		480,348.15			448,791.44			31,556.71
U. S. Liberty loan bonds	$181,900.00			761,071.18			384,171.18	
Less: Bank liability	95,000.00	86,900.00		290,000.00	471,071.18			
Total securities owned			567,248.15			919,862.62	352,614.47	
Inventories and current assets:								
Inventories—								
New machines	79,804.77			92,684.66			12,879.89	
Second-hand machines	96,248.32			75,552.96				20,695.36
Repair parts	3,449.89			3,126.45				323.44
Materials and supplies	1,632.61			2,254.78			622.17	
Total inventories, including consignments (see contra)		181,135.59			173,618.85			7,516.74
Current assets—								
Cash on hand, home and branch office	6,743.64			7,539.72			796.08	
Cash in banks	294,902.10			330,740.24			35,838.14	
Notes receivable of customers	101,134.50			130,548.21			29,413.71	
Notes receivable of customers, past due	26,442.51			17,225.07				9,217.44
Accounts receivable, customers	1,273,241.29			1,202,416.28				70,825.01
Doubtful accounts receivable	393.90							393.90
Freight claims	546.43			594.58			48.15	
Loans secured by S. Hasbrook insurance policy	6,302.37							6,302.37
Protested or post-dated checks	203.96							203.96
Advances on account of purchase orders	91,035.73							91,035.73
Accounts due from officers, stockholders, and employees	11,904.71			1,280.79				10,623.92

U. S. certificate of indebtedness				165,000.00			165,000.00	
Sundry items in suspense				5,555.19			5,555.19	
Total current assets		1,812,851.14			1,860,900.08		48,048.94	
Total inventory and current assets			1,993,986.73			2,034,518.93	40,532.20	
Prepaid operating expense:								
Merchandise cartage			72.76			17.06		55.70
Total assets			$2,606,688.22			3,003,823.06	397,134.84	
117 CAPITAL AND LIABILITIES								
Capital stock:								
Common capital stock		$500,000.00			$500,000.00			
Preferred capital stock					250,000.00		250,000.00	
Total capital stock			$500,000.00			750,000.00	250,000.00	
Surplus (see Exhibit 2)			917,585.28			*1,664,400.35	746,815.07	
Reserves			97,145.53			78,831.99		18,313.54
Bond payable, Henry Prentiss			266,000.00					266,000.00
Current liabilities:								
Accounts payable (purchases)		731,433.50			459,630.76			271,802.74
Customer's advance payments		54,066.16						54,066.16
Due to officers, stockholders, and employes		25,755.99			32,379.95		6,623.96	
Taxes accrued					750.00		750.00	
Total current liabilities			811,255.65			492,760.71		318,494.94
Consignors (see Inventories, contra Schedule B)			14,701.76			17,803.01	3,128.25	
Total capital and liabilities			$2,606,688.22			$3,003,823.06	$397,134.84	

* Subject to deduction for Federal and excess-profits taxes for which no reserve has been set aside.

This statement is subject to our comments upon the examination.

Defendant's Exhibit B

Exhibit 1

Henry Prentiss and Company, Inc.—Comparative statement of condition as of December 31, 1918 and 1919

	1918			1919			Increase	Decrease
LIABILITIES AND CAPITAL								
Current assets and inventories:								
Current assets—								
Cash on hand and in home and branch offices	$7,539.72			$6,021.60				$1,518.12
Cash in banks	330,740.24			195,298.93				135,441.31
Notes receivable of customers	130,548.21			106,431.05				24,117.16
Accounts receivable	1,202,416.28			764,923.02				437,493.26
Notes receivable, past due	17,225.07			1,294.02				15,931.05
Accounts due from officers and employees	1,280.79			2,631.57			$1,350.78	
U. S. certificates of indebtedness	165,000.00			0.00				165,000.00
Sundry items in suspense	5,555.19			0.00				5,555.49
Freight claims	594.58			42.33				552.25
Total current assets		$1,860,900.08			$1,076,642.52			784,257.56
Inventories—								
New machines	92,684.66			71,746.94				20,937.72
Second-hand machines	75,552.96			103,110.71			27,557.75	
Repair parts	3,076.32			0.00				3,076.32
Total inventories		171,313.94			174,857.65		3,543.71	
Total current assets and inventories			2,032,214.02			$1,251,500.17		780,713.85
Securities owned (Schedule A):								
Securities of other companies		448,791.44			457,517.19		8,725.75	
U. S. Liberty loan bonds	761,071.18			833,266.38				
Less: Liability to banks	290,000.00	471,071.18		0.00	833,266.38		362,195.20	
Total securities owned			919,862.62			1,290,783.57	370,920.95	
Property, plant, and equipment:								
Real estate, Jersey City warehouse		34,628.92			32,758.90			1,870.02
Warehouse equipment		2,902.57			2,902.57			
Warehouse fixtures		1,564.36			1,407.96			156.40
New York office fixtures		2,279.23			3,700.28		1,421.05	
Boston office fixtures		367.75			447.00		79.25	
Buffalo, Rochester, and Syracuse office fixtures		2,799.35			1,396.10			1,403.25
Automobiles and trucks		4,882.27			6,528.42		1,646.15	
Total property, plant, and equipment			49,424.45			40,141.23		283.22

Prepaid operating expense:								
Merchandise cartage		17.06			0.00			17.06
Materials and supplies		2,304.91			0.00			2,304.91
Total prepaid operating expense			2,321.97			0.00		2,321.97
Total assets			$3,003,823.06			$2,591,424.97		$412,398.09
119 ASSETS								
Current liabilities:								
Accounts payable, trade	459,630.76			385,601.00				74,029.76
Accounts due to officers and employees	32,379.95			10,544.78				21,835.17
Taxes accured	750.00			0.00				750.00
Bank overdraft	0.00			27,320.50			27,320.50	
Total current liabilities		492,760.71			423,466.28			69,294.43
Consignors (see Inventories, contra Schedule B)		17,830.01			23,096.98		5,266.97	
Total liabilities			510,590.72			446,563.26		64,027.46
Capital:								
Capital stock—								
Preferred, authorized	250,000.00			250,000.00				
Less: Retired stock	0.00			14,000.00				
Issued and outstanding		250,000.00			236,000.00			14,000.00
Common, authorized and issued		500,000.00			500,000.00			
Total Capital Stock		750,000.00			736,000.00			14,000.00
Reserves, general		78,831.99			74,910.42			3,921.57
Reserve for Federal income and excess-profits taxes		533,676.51			43,375.24			490,301.27
Surplus (See Exhibit 2)		1,130,723.84			1,290,576.05		159,852.21	
Total capital			2,493,232.34			2,144,861.71		348,370.63
Total liabilities and capital			$3,003,823.06			$2,591,424.97		$412,398.09

This statement is subject to our comments upon the examination.

Defendant's Exhibit C

Exhibit 1

Henry Prentiss and Company, Inc.—Comparative statement of condition as of December 31, 1919 and 1920

	December 31, 1919			December 31, 1920			Increase	Decrease
ASSETS								
Current assets and inventories:								
Current assets—								
Cash on hand in home office	$4,721.60			$4,000.00				$721.60
Cash on hand in branch offices	1,300.00			1,700.00			$400.00	
Cash in banks	195,298.93			174,847.08				20,451.85
Notes receivable of customers	106,431.05			209,882.31			103,451.26	
Accounts receivable	764,923.02			368,419.60				396,503.42
Notes receivable, past due	1,294.02			39,930.58			38,636.56	
Accounts due from officers and employees	2,631.57			20,202.10			17,570.53	
Freight claims	42.33			0.00				42.33
Total current assets		$1,076,642.52			$818,981.67			$257,660.85
Inventories—								
New machines	$71,746.94			$99,463.34			$27,716.40	
Second-hand machines	103,110.71			196,629.30			93,518.59	
Total inventories		174,857.65			296,092.64		$121,234.99	
Total current assets and inventories			$1,251,500.17			$1,115,074.31		$136,425.86
Investments (Schedule A):								
Securities of other companies		$457,517.19			$631,749.69		$174,232.50	
U. S. Liberty loan bonds		833,266.38			611,516.38			$221,750.00
Total investments			1,290,783.57			1,243,266.07		47,517.50
Fixed assets:								
Real estate, Jersey City warehouse		$32,758.90			$35,173.90		$2,415.00	
Warehouse equipment		2,902.57			2,612.30			$290.27
Warehouse fixtures		1,407.96			1,267.17			140.79
New York office fixtures		3,700.28			4,319.80		619.52	
Boston office fixtures		447.00			411.50			35.50
Buffalo, Rochester, and Syracuse office fixtures		1,396.10			1,775.41		379.31	
Hartford office fixtures		0.00			644.10		631.79	
Automobiles and trucks		6,528.42			7,160.21		631.79	
Total fixed assets			49,141.23			53,364.39	$4,223.16	
Total assets			$2,591,424.97			$2,411,704.77		$179,720.20

Current liabilities:								
Accounts payable, trade	$385,601.00			$155,355.78				$230,245.22
Accounts due to officers and employees	10,544.78			8,166.30				2,378.48
Bank overdraft	27,320.50			7,785.91				19,533.59
Taxes accrued	0.00			9,880.55			$9,880.55	
Total current liabilities		$423,466.28			$181,189.54			$242,276.74
Consignors (see Inventories, contra Schedule B)		23,096.98			91,540.80		$68,443.82	
Total liabilities			$446,563.26			$272,730.34		$173,832.92
Capital:								
Capital stock—								
Preferred, authorized	$250,000.00			$250,000.00				
Less—Retired stocks	14,000.00			28,000.00			$14,000.00	
Issued and outstanding		$236,000.00			$222,000.00			$14,000.00
Common, authorized and issued		500,000.00			500,000.00			
Total capital stock		$736,000.00			$722,000.00			$14,000.00
Reserves, general		74,910.42			0.00			74,910.42
Reserve for Federal income and excess-profits taxes		43,375.74			94,249.50		$50,873.76	
Surplus (see Exhibit 2)		1,290,575.55			1,322,724.93		32,149.38	
Total capital			2,144,861.71			2,138,974.43		$5,887.28
Total liabilities and capital			$2,591,424.97			$2,411,704.77		$179,720.20

This statement is subject to our comments upon the examination.

122 In United States Circuit Court of Appeals for the Second Circuit

HENRY PRENTISS & CO., INC., APPELLEE

v.

UNITED STATES OF AMERICA, APPELLANT

Order omitting exhibits

On the annexed consent of the parties hereto it is

Ordered that the petitioner's Exhibits 1, 2, 4, 7, 12, 16, 17, and 18 need not be printed in the record herein, but the same may be referred to on the argument and shall be deemed as part of the record as if the same had been printed herein.

Dated, New York, September 21st, 1931.

MANTON, *U. S. C. J.*

Entry of the above order is hereby consented to.

Dated, New York, September 18, 1931.

JEFFERY & REDMOND,
Attorneys for Petitioner-Appellee.
GEORGE Z. MEDALIE,
Attorney for Defendant-Appellant.

123 In United States District Court

[Title omitted.]

Affidavit and order to show cause

Upon the annexed affidavit of Leon E. Spencer, assistant United States attorney for the Southern District of New York, verified January 31st, 1930, let the plaintiff, Henry Prentiss & Company, Inc., and/or his attorneys, Jeffery & Redmond, show cause at a stated term of the United States District Court for the Southern District of New York, for the hearing of motions to be held in the old Post Office Building, Borough of Manhattan, city of New York, on the 4th day of February, 1930, the opening of court on that date or as soon thereafter as counsel can be heard, why an order should not be made permitting the defendant above named to amend his answer to the plaintiff's petition by serving and filing an amended answer, a copy of which is annexed to this order to show cause; and in the meantime and until the hearing and the decision of the application under
124 this order, it is hereby ordered and directed that the above-entitled case, which now appears on the civil-jury calendar of this court, be not brought on for trial.

Sufficient cause existing for the granting of this order, service thereof on Jeffery & Redmond, attorney for the plaintiff, within two days after this date shall be deemed sufficient service.

Dated, New York, N. Y., January 31st, 1930.

ALFRED C. COXE, *U. S. D. J.*

In United States District Court

[Title omitted.]

STATE OF NEW YORK,
County of New York, ss:

Leon E. Spencer, being duly sworn, deposes and says that he is an assistant United States attorney for the Southern District of
125 New York and now has charge of the above-entitled action; that this action was brought by the plaintiff by the service of a petition in due form on the United States of America, defendant, on or about the 16th day of September, 1927; that thereafter and on or about the 19th day of October, 1928, that issue was joined by the service of an answer on behalf of the defendant; that in this action the plaintiff seeks to recover certain taxes alleged to have been erroneously paid to William H. Edwards, collector of internal revenue, for the years 1918, 1919, and 1920, the plaintiff contending that the Commissioner of Internal Revenue failed to allow on the audit of the taxpayer's returns sufficient amounts as invested capital for said years; that the plaintiff filed with the Commissioner of Internal Revenue a claim for refund for the year 1918 of the said taxes alleged to have been illegally collected, claiming relief under sections 327 and 328 of the revenue act of 1918; that the Commissioner of Internal Revenue on or about July 16, 1925, notified the taxpayer that his 1918 claim for refund would be rejected because the plaintiff's situation revealed no abnormality evidenced by gross disproportion between the tax computed without the benefit of sections 327 and 328 of the revenue act of 1918, and the tax computed by reference to the representative concerns specified in section 328; that the time within which the plaintiff could file a new claim for refund for the year 1918 expired June 16, 1924; that in the present action now pending before this court the plaintiff seeks relief differing from
126 the relief requested in the claim for refund filed for the calendar year 1918. In other words, the plaintiff contends now in this cause that he is entitled to increased invested capital pursuant to the provisions of section 326 of the revenue act of 1918, whereas in his claim for refund he requested relief under sections 327 and 328 of the revenue act of 1918.

That with respect to the calendar year 1919 the plaintiff's claim for refund was filed on or about April 28, 1925, and requested the Commissioner of Internal Revenue to refund the sum of $3,666.48 because

the plaintiff contended that the sum of $13,094.64 paid as taxes to the State of New York should be deducted from the gross income for the year 1919. The Commissioner of Internal Revenue allowed this deduction to the plaintiff. In this present action the plaintiff in so far as 1919 is concerned seeks to benefit by the provision of section 326 of the revenue act of 1918; in other words, on the ground not stated in the claim for refund.

Deponent further states that the answer as originally filed to the petition in the above-entitled action admitted among other things that "claims for all of said years for inclusion of said sum of $180,067.08 in invested capital have been denied by said commissioner"; that on January 3, 1930, deponent received a letter from the office of the General Counsel, Bureau of Internal Revenue, at Washington, advising that the present suit was brought on grounds other than those which had been before the Commissioner of
127 Internal Revenue; in other words, that the grounds as stated in the claims for refund for the years 1918 and 1919 differed materially from the grounds set forth in the plaintiff's petition in the above-entitled action; that thereupon deponent communicated this fact to the firm of Jeffery & Redmond, attorneys for the plaintiff, and subsequently served upon said attorneys a copy of proposed amended answer, a copy of which is annexed hereto, and requested that defendant be permitted to file said amended answer denying that the Commissioner of Internal Revenue had ever considered the question of the allowance of additional invested capital for the years 1918 and 1919. Said amended answer also contained a separate defense in so far as the year 1919 is concerned by stating that the plaintiff's claim for refund for the year 1919 was allowed and not rejected as stated in the original answer.

That in order to enable the defendant to make his defense in the above-entitled action, it is submitted, an amended answer should be permitted which will set forth the facts as they occurred, and that unless such amended answer is permitted the plaintiff undoubtedly will succeed in establishing relief which was not claimed in the claims for refund filed for the years 1918 and 1919 with the Commissioner of Internal Revenue. Deponent has been directed, by a letter received from the office of the General Counsel, Bureau of Internal Revenue, to insist on such defenses as are herein set forth. That the case is now on the civil-jury calendar, and a stay of the trial is
128 requested so that the court may have the opportunity of determining whether or not an amended answer may be served in this action.

Wherefore, deponent prays for an order staying the trial of the above-entitled case until the hearing on this application and for a further order permitting the defendant to file an amended answer in the above-entitled action, as hereinabove requested.

LEON E. SPENCER.

Subscribed and sworn to before me this 31st day of January, 1930.

ARMAND CHANKALIAN,
Notary Public, New York Co.

Clerk's No. 375, Reg. No. 1C335.
Commission expires March 30, 1931.

129 In United States District Court

[Title omitted.]

Affidavit in opposition to motion to file amended answer

STATE OF NEW YORK,
County of New York, ss:

William P. Jeffery, being duly sworn, deposes and says:

I am one of the attorneys for the plaintiff, and I have full and complete personal knowledge of all the facts and circumstances surrounding this action. My knowledge arises from the fact that I represented the plaintiff in all its dealings with the defendant concerning the matters at issue in this action.

This action was instituted to recover taxes illegally assessed against and paid by the plaintiff for the years 1918, 1919, and 1920. It is based upon the failure of the Commissioner of Internal Revenue to increase the statutory invested capital of plaintiff for each of said years by the sum of $180,371. 08. Plaintiff claims that it was entitled to such increase for 1918 and to a similar increase plus resulting adjustments for the two succeeding years.

130 Paragraph 6 of the petition alleges its claim in the following language:

"6. That on or about the 1st day of September, 1916, petitioner acquired all the business, property, and assets, including name, good will, contracts, and rights of every character and description, of Prentiss Tool & Supply Company, a New York corporation, subject to the debts of said company, and issued in payment therefor all the capital stock of the petitioner of the par value of $100 each; that the actual cash bona fide paid in for said stock or shares, as aforesaid, and the actual cash value of tangible property other than cash bona fide paid in for such stock or shares at the time of such payment, as aforesaid, amounted to the sum of $994,564.43; that the actual cash value of the said name, good will, contracts, and rights of every character and description bona fide paid in for said stock or shares, as aforesaid, was $1,400,000.

"That included in the tangible properties so acquired by petitioner was certain real estate located in Jersey City, New Jersey, which was entered and carried on the books of the petitioner at an amount $55,067.88 less than the actual cash value of such property.

"That in computing the income and excess-profits and war-profits taxes due from petitioner for each of the years ended December 31,

1918, December 31, 1919, and December 31, 1920, the Commissioner of Internal Revenue has failed, neglected, and refused to
131 include in and as invested capital, and to allow same as paid-in surplus, in accordance with the provisions of the revenue act of 1918, the said $56,067.08, being the excess of the actual cash value of said real property over the value thereof appearing on the books of petitioner and over the value allowed therefor by the Commissioner of Internal Revenue in computing invested capital; that said commissioner has further failed, neglected, and refused to allow as and include in invested capital for said years ended December 31, 1918, December 31, 1919, and December 31, 1920, any part of the said sum of $1,400,000, the actual cash value of the name, good will, contracts, and rights of every character and description for which the capital stock of petitioner was issued in an amount in excess of $125,000, as aforesaid, whereas the said Commissioner of Internal Revenue should have included in said invested capital the said $55,067.08 as paid-in surplus, and $125,000, being twenty-five per cent of the par value of the total stock or shares of petitioner outstanding March 3, 1917. Thereby the invested capital of petitioner was understated in the sum of $180,067.08 by the Commissioner of Internal Revenue in the determination of income and excess-profits tax liability for each of said years."

The defendant answered said paragraph by paragraph third of the answer in the following manner:

132 "Third. It admits that in computing the income and excess-profits and war-profits taxes due from the petitioner for each of the three years ending December 31, 1918, December 31, 1919, and December 31, 1920, the Commissioner of Internal Revenue refused to include in the invested capital of the petitioner the sum of $55,067.08, and also refused to include in invested capital the sum of $1,400,000; except as so admitted, it denies that it has any knowledge or information sufficient to form a belief as to any of the allegations of the 6 paragraph of the complaint."

The only matters alleged in paragraph 6 of the petition which were put at issue were the facts as to the acquisition of the properties of Prentiss Tool and Supply Co. and as to the values of said properties and that the plaintiff was entitled to the increase in invested capital alleged.

Paragraph 7 of the petition alleged that by reason of the refusal of the Commissioner of Internal Revenue to increase the invested capital as alleged the plaintiff was compelled to make overpayments of income and excess-profits taxes for the years 1918, 1919, and 1920. The allegations of this paragraph were denied by paragraph fourth of the answer.

It is then alleged in paragraph 8 of the petition:

"8. That petitioner duly filed claims for refund of overpayments of income and excess-profits taxes as aforesaid, pursuant to
133 the statutes of the United States made and provided, and pursuant to regulations of the Secretary of the Treasury pre-

scribed pursuant to said statutes, upon the ground that said taxes had been illegally and wrongfully assessed and collected."

The allegations of this paragraph 8 were specifically admitted by paragraph second of the answer.

Paragraph 9 of the petition, so far as material, alleges as follows: "That thereafter certain proceedings were had in connection with the determination of income and invested capital, and in connection with the determination of income and excess-profits taxes of petitioner for the years ended December 31, 1918, December 31, 1919, and December 31, 1920; * * * and petitioner's claims for all of said years for inclusion of said sum of $180,067.08 in invested capital have been denied by said commissioner; that two years have not elapsed since the denial and rejection of said claims for refund, and more than six months have elapsed since the filing thereof."

All the allegations of paragraph 9 were specifically admitted by paragraph second of the answer.

It is evident, therefore, that the only issues presented by the pleadings were whether the properties acquired by the plaintiff, as alleged, were of the values claimed and whether the Com-
134 missioner of Internal Revenue had acted wrongfully in refusing to increase the invested capital in the amount of $180,-371.08. These issues went to the merits.

The defendant admitted that plaintiff had complied with all the formalities required by section 3226 of the Revised Statutes (U. S. C., section 156), before bringing suit, to wit, the due filing of claims for refund with the commissioner of Internal Revenue according to the provisions of law and the regulations of the Secretary of the Treasury, the expiration of six months from the filing of such claims, and that such suit was begun within two years after the disallowance of the claims. It was likewise admitted that the relief sought in this action was demanded of the Commissioner of Internal Revenue and refused.

The present motion for leave to file an amended answer in effect seeks permission to withdraw its specific admissions of the facts alleged in paragraphs 8 and 9 of the complaint, and it would now deny that the plaintiff duly filed claims for refund for the years 1918 and 1919, seeking the inclusion of the sum of $180,067.08 in invested capital for said years, and it would now deny that claims of such nature for those years were ever denied by the Commissioner of Internal Revenue.

Defendant, by the proposed amended answer, now wishes to make the contention for the first time that plaintiff never requested of the Commissioner of Internal Revenue the relief which it now seeks in this action.

Whether this motion should be granted depends principally upon whether the moving papers set forth sufficient equitable
135 grounds for the relief asked. We insist that the affidavit upon which the motion is made is entirely lacking in that respect. That affidavit states substantially as follows:

That the plaintiff by this action seeks an increase of its invested capital under section 326 of the revenue act of 1918 and that the claims for refund for 1918 and 1919 did not seek such increase under section 326; "that on January 3, 1930, deponent received a letter from the office of the General Counsel, Bureau of Internal Revenue at Washington, advising that the present suit was brought on grounds other than those which had been before the Commissioner of Internal Revenue"; that if the motion is not granted "the plaintiff undoubtedly will succeed in establishing relief"; and that "deponent has been directed, by a letter received from the office of the General Counsel, Bureau of Internal Revenue, to insist on such defenses as are herein set forth."

We submit that under the law, the rules, and the decisions the defendant has shown no good reason why it should be permitted to amend at this time.

In order that this court may see the lack of equity in this application, I shall state some facts which are not contained in the moving affidavit.

It is true that the original claims for refund for 1918 and 1919 did not specifically ask for an increase of invested capital under section 326 of the revenue act of 1918. It is true that so far as 1918 is
concerned the Commissioner of Internal Revenue, by letter
136 dated July 16, 1925, notified plaintiff that its claim for relief under sections 327 and 328 "will be rejected." The Circuit Court of Appeals for the Second Circuit has held that such a letter does not constitute such a rejection as starts the statute of limitations running. (Michel v. U. S. Prentice-Hall Fed. Tax Service, 1930, vol. 1, par. 332.) I am informed and believe that the Commissioner of Internal Revenue took no other formal step by scheduling or otherwise to make such letter effective as a rejection or denial of the claim.

Whether such letter constituted a rejection or not is immaterial, because by letter dated February 13, 1926, the Solicitor of Internal Revenue advised plaintiff that he had before him for consideration its claim for refund for the year 1918 and that an oral hearing would be had if the plaintiff so desired. The plaintiff expressed a wish for an oral hearing, and on March 12, 1926, such oral hearing was had.

In my discussion of the merits of plaintiff's claim with the person in the solicitor's office in charge of the matter I was informed that, although there was doubt as to the right to relief under sections 327 and 328, it appeared that plaintiff was entitled to an increase of its statutory invested capital for the years 1918, 1919, and 1920 under section 326 of the law. It was suggested to me that I cause to be filed on behalf of plaintiff additional proof of the facts as to the value of the properties acquired by plaintiff from Prentiss Tool & Supply Co. on September 1, 1916.

137 Pursuant to the suggestion of the office of the solicitor, plaintiff executed on April 8, 1926, an application for relief under sections 326, 327, and 328. Such application was duly filed with the office of the solicitor. Such application contained all the facts and data upon which the present action is based.

Thereafter I was advised personally by the solicitor's office that plaintiff's claims were rejected. At no time was it suggested that the claims for refund were insufficient, but on the other hand all indications were that recomputation under section 326 was denied upon the merits. At that time the commissioner consistently took the position that in a case such as plaintiff's no allowance could be made in invested capital under section 326 for good will, exclusive agency contracts, or the value of tangible property in excess of its value set up on the books of the corporation. As a matter of fact, the commissioner denied this plaintiff a recomputation of its invested capital under section 326 for the year 1920, although the claim for refund for that year is conceded to have been sufficient.

The plaintiff instituted this action on September 16, 1927, pursuant to sections 762 and 763 of U. S. C. (24 Stat. 506). A copy of the petition was served upon the district attorney and upon the Attorney General. Since under the statute the duty is imposed upon the district attorney of appearing for the Government, it would seem that the requirement for service upon the Attorney General in Washington was inserted because the latter is at the source of all information in connection with a suit of this nature.

138 Although this suit was instituted on September 16, 1927, the answer was not interposed until one year and one month later, to wit, October 19, 1928. That answer admitted that the claims for refund were sufficient. During the pendency of this action I have had prolonged negotiations for settlement with the district attorney which have actually continued up to a short time ago. During all these negotiations the merits only were considered, no question having been raised as to the sufficiency of the claims. On the merits the district attorney has practically conceded that plaintiff is entitled to prevail, the affidavit attached to the order to show cause herein specifically stating that on the pleadings as they stand "the plaintiff undoubtedly will succeed" (p. 4).

The action appeared on the day calendar for trial on January 8, 1930, and has appeared almost daily since. On each appearance it was marked "Ready" until Monday, February 3, 1930, when the court was advised of this motion. It was not until January 27, 1930, that I was informed of defendant's desire to amend, and I refused to consent.

I had every reason to believe that the Commissioner of Internal Revenue was advised immediately upon the institution of this suit of its nature and of the claims made. We must assume that the

district attorney, before filing an answer, called for all information available to enable him to defend the action. We must assume that the claims for refund were put at his disposal. If they were, then he could see just as well then as now that the claims for 1918
139 and 1919 made no mention of section 326 of the revenue act and that the petition in this case mentions only section 326.

In the absence of any statements in the moving affidavit as to the reason why this defense was not interposed when the answer was filed this court may and should draw the following inferences:

That as soon as this suit was instituted, at any rate before the answer was filed, the Bureau of Internal Revenue collected and examined all the papers bearing upon plaintiff's claims for refund for 1918, 1919, and 1920, and learned of all proceedings in connection therewith; that the bureau saw that the claims for 1918 and 1919 did not mention section 326 of the revenue act and did not ask for increase of invested capital thereunder; that the bureau saw that the petitioner in this suit did mention section 326 and did ask for increase of invested capital thereunder; that the bureau knew whether or not the plaintiff's claim for increase of invested capital under section 326 had been considered and decided upon the merits; that the bureau knew from reading the petition and the claims for refund that there was this technical defense that the claims did not mention section 326; that the bureau advised the district attorney that on the merits the plaintiff, under section 326, was not entitled to an increase in invested capital and advised him to defend the suit on that ground; that the bureau, on January 3, 1930, two years and four months after the institution of suit, directed the district
140 attorney to attempt to raise this technical defense, only because it was then persuaded that plaintiff was legally entitled to an increase of invested capital under section 326.

Once the Government permits itself to be sued in its own courts, it becomes subject to the very same rules of equity, honesty, and fair dealing to which the individual suitor is subject. In a court of equity the Government will receive no more consideration than any individual.

Sec. 777 of U. S. Code (sec. 954, Rev. Stat.) provides that the court "may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe."

Rule 6 of the common-law rules of this court provides:

"In all cases not provided for by the rules of this court causes at common law shall proceed as nearly as may be in accordance with the law for the time being of the State of New York and the practice thereunder of the supreme court of said State."

Section 105 of the N. Y. civil practice act provides:

"At any stage of any action, special proceeding or appeal, a mistake, omission, irregularity or defect may be corrected or supplied, as the case may be, in the discretion of the court * * *."

Neither under the provisions of these several enactments, nor
141 under the equitable power inherent in every court to prevent injustice is the defendant entitled to the favor which it now asks. The Supreme Court, in Eberly v. Moore (24 How. 149), has stated the reason for the exercise of the equitable power of permitting amendments:

"The equitable jurisdiction of the courts of the United States as courts of law is chiefly exercised in the amendment of pleadings and proceedings in the court, and in the supervision of all the various steps in a cause, so that the rules and practice of the court shall be so administered and enforced as to prevent hardship and injustice, and that the merits of the cause may be fairly tried."

In re Royce Dry Goods Co. (133 Fed. 100) the court said:

"Conformably to the spirit of this statute, the courts have always been and shoul be liberal in the allowance of any form of pleading to meet the ends of justice and prevent mere technical objections, to defeat justice."

By this application the defendant is begging this court to exercise its equitable powers. And to what purpose? "To prevent hardship and injustice, and that the merits of the cause may be fairly tried," as said in Eberly v. Moore (supra)? "To meet the ends of justice and prevent mere technical objections, to defeat justice," as said In re Royce (supra)? Is it not rather to permit mere technical
142 objections to defeat justice, to impose hardship and injustice and so that the merits of this cause may not be tried at all?

This plaintiff has been endeavoring for ten years to get the Government to see the justice and legality of its claim for relief. For ten years the Government refused to admit that plaintiff had any legal right to relief and now upon the eve of trial, knowing that upon the merits the plaintiff is entitled to recover, the defendant presents itself in a court of equity and seeks to interpose a mere technical defense which will do inequity if allowed.

In Salisbury v. Bennett (72 Fed. 743) the defendant sought leave to amend his answer by setting up the statute of limitations. The excuse given for not interposing this defense was that under the decisions of the State courts as they then stood defendant's counsel assumed that it was a defense which he could not establish and that there had been a recent decision holding that the defense could be established. The matter was heard before Judge Lacombe and he held that the old rule which discriminated against the defense of the statute of limitations as unmeritorious is not as strictly enforced as it once was and he also stated that the excuse given for not pleading the defense originally was a reasonable one. He went on to say, however:

"Nevertheless when application is made to the favor of a court for leave to interpose any defense, and the application is one resting in discretion, all the circumstances of the case will be con-
143 sidered, and care taken not to sanction any such abuse of procedure as would shock the conscience."

And he closed as follows:

"It would be so grossly inequitable to permit him thus to defeat the plaintiff's claim that his application should be denied."

Furthermore, under the decisions, the defendant's request may not be granted because, first, a defendant will not be allowed to file an amendment contradicting an admission made in his original answer unless for some persuasive reason, such as mistake or fraud; secondly, a defendant will not be permitted to amend when he knew of the defense which he wishes to interpose at the time his answer was drawn or might have discovered it by the exercise of reasonable diligence.

In Smith v. Athens (74 Hun 26, 28) it was said:

"The order denying leave to amend the answer was discretionary and the discretion was wisely exercised.

"The answer expressly admits the due execution of the contract. The alleged defects in the execution of the contract, if they exist, must have been well known to appellant when the answer was interposed. If they existed, the appellant clearly elected to waive them and defend the action upon the merits. To such election it should be held. To allow it first to admit and then, after reflection, to deny facts upon which the rights of parties rest, would not be in furtherance of justice."

144 In Diehl v. Robinson (35 Misc. 234, 235) the court said:

"I am convinced, from a careful consideration of the facts presented on this motion, that to allow the amendment permitting defendant to deny that which he has previously admitted, and upon which admission plaintiff has rested down to the present time, the case being on the day calendar for trial, would not be 'in furtherance of justice, as provided by section 723 of the code."

In Levy v. Delaware, Lackawanna & Western R. R. Co. (211 App. Div. 503, 505) the court said:

"By its original answer defendant admitted that it was a common carrier and operating a railroad between New York and Buffalo, and received the goods.

"In any matter which involves their individual rights, the parties may agree upon the existence or truth of certain facts which they wish to present to the court for adjudication. They may agree to a submission of a controversy upon an agreed statement of facts. (Civ. prac. act, 546.) If the parties are satisfied, the court will not concern itself whether these are the actual facts. They may so agree by admission in pleadings, in which case a party having once admitted facts alleged must abide by his admission, although he much desires to prove the contrary. (Kuester v. Paige Sales Co., 209 App. Div. 294, 296; Pennacchio v. Greco, 107 id. 225; Thompson
145 v. Postal Life Ins. Co., 226 N. Y. 363.) They may agree by stipulation not only upon the facts but upon the waiver of statutory or constitutional rights, and thereby make the law for their

proceeding, and thus become estopped from denying that there is another law applicable to their rights. (Vose v. Cockcroft, 44 N. Y. 415; Cox v. N. Y. C. &. H. R. R. R. Co., 63 id. 414; Matter of N. Y., L. & W. R. R. Co., 98 id. 447, 453; Cowenhoven v. Ball, 118 id. 231, 235.)

"Where a party has through inadvertence, mistake, or other cause made an admission or entered into a stipulation as to facts which are not true, there is, of course, power in the court to furnish relief in the exercise of sound judicial discretion upon good cause shown and in furtherance of justice. But where a party seeks to amend a pleading which has admitted facts, or to be relieved from a stipulation to the same effect which has been relied or acted upon by the other party, and to grant relief would prejudice substantial rights of the latter, the court should not exercise its discretion in thus changing the situation of the parties."

In Metropolitan Nat. Bank v. St. Louis Dispatch Co. (38 Fed. 57) it was said:

"The bill was one to foreclose a mortgage. The property covered by the mortgage was certain tangible property, such as type, printing presses, etc., the good will of the Dispatch newspaper, and
146 one share in the Associated Press. In all the prior bills the allegation was that the tangible property had long since been used up or destroyed * * *. Now, this amended bill changes entirely this fact, which has been adjudged a basal one, and alleges that that tangible property—the type, printing presses, etc.—is still in existence, and in the possession of the principal defendant * * *. Where an amended bill is sought to be filed which is based upon allegations contradicting those in the prior bill, those allegations being of substantial and basal facts, it seems to us the court may properly refuse to allow it to be filed. The bill is not stating new and additional facts; it is not alleging in a fuller or different way facts hitherto averred; it is not an amended bill, but it is a bill contradicting the basis upon which complainant sought to proceed. Motion to strike out will be sustained.

In 31 Cyc. 422, 423, the rule is stated as follows:

"As a general rule a party will not be allowed to file an amendment contradicting an admission made in his original pleadings. If it be proper in any case, it must be upon very satisfactory evidence that the party has been deceived or misled, or that his pleading was put in under a clear mistake as to the facts.

"The court will not ordinarily permit defendant to file an amended plea or answer when the matter of defense proposed
147 by the amendment was known to defendant when he filed his original plea, and no valid excuse is given for not including it therein."

In Pratt, Hurst & Co., Ltd. v. Tailer (99 App. Div. 236, 238) it was said:

"This affidavit is insufficient under the well-settled rule, which, as we have already stated, is that ordinarily a party will not be permitted to amend a pleading for the purpose of setting forth facts of which he had full knowledge at the time of interposing the original pleading, and that facts satisfactorily excusing the failure or neglect in not setting forth all the material facts in the original pleading must be shown. In the case at bar neither is it shown that the new facts sought to be set up in the amended complaint were not known to the plaintiff or its attorney in fact, nor is any explanation given of the omission to allege them originally. The plaintiff, therefore, failed to present a case warranting the granting of the amendment."

In Jacobs v. Mexican Sugar Refining Co., Ltd. (115 App. Div. 499) the court said:

"Notwithstanding recent decisions by which this court has indicated a policy of liberality in the allowance of amendments to pleadings in order that litigants may shape their issues as may seem best to them, yet it seems to me that the order in this case should
148 not have been made. The defense proposed to be inserted in the answer some eighteen months after the commencement of the action seeks to defeat the action by the present repudiation of a lease upon the ground that it was fraudulent in fact at the time it was made, because of the participation in the making of the lease by directors interested in the result. But in the original answer it asserts that it did 'in earnestness cancel said lease because of the default of the sugar company in paying the rent then due and payable to this company,' which was an acknowledgment of the original validity of the lease. It appears affirmatively that the officers of the company controlling it and making the affidavits upon which this motion was based were possessed of all the knowledge to enable them to set up the defense now sought to be interposed, not only when the original answer was served, but when the action was commenced, as they expressly so admit.

"I understand it to be well established that ordinarily a party will not be permitted to amend a pleading for the purpose of setting forth facts of which he has full knowledge at the time of interposing the original pleading, and that facts satisfactorily excusing the failure or negligence in not setting forth all the material facts in the original pleading must be shown."

In Jefferson v. Burhans (85 Fed. 924, 926) the court said that the amendment was properly refused "because by permitting
149 it an entirely new defense would be interposed, which was not suggested by the original answer, although the new defense must have been as well known to the defendant when the original answer was filed as when leave to amend the same was asked."

Judge Story, in Smith v. Babcock (3 Sum. 583), speaking on the subject, said:

"Considering the solemnity of answers, I should be sorry to see any practice introduced which should in any, the slightest degree encourage negligence, indifference, or inattention to the duties imposed by law upon parties who are called upon to make statements under oath. And it seems to me that, before any court of equity should allow such amended answers, it should be perfectly satisfied that the reasons assigned for the application are cogent and satisfactory; that the mistakes to be corrected or the facts to be added are made highly probable, if not certain; that they are material to the merits of the case in controversy; that the party has not been guilty of gross negligence, and that the mistakes have been ascertained and the new facts have come to the knowledge of the party since the original answer was put in and sworn to."

Certainly the defendant has shown no reason why the principles stated in the foregoing authorities should not be applied here and should not defeat this application. The moving papers are
150 absolutely silent as to reasons why the defendant should be permitted to deny now what it has admitted for so long.

The affidavit simply states that on January 3, 1930, the general counsel, Bureau of Internal Revenue, advised deponent that this suit was brought on grounds other than those set up in the claims for refund. But when was that fact first discovered? If it was discovered prior to the filing of the original answer, and the defendant had 13 months to prepare that, there arises a conclusive presumption that defendant waived the technical objection.

If the fact was not discovered until January 3, 1930, two years and 4 months after the suit was instituted, there was such gross carelessness or negligence that a court of equity should not relieve it. Granted that the rules will not be strictly enforced against the Government in certain circumstances, still here is a case where the fact did not have to be learned from an investigation. It appeared on the face of the written documents. The most cursory examination of the claim and the petition would not have failed to disclose the fact that the petition proceeded under section 326 and the claims for refund did not mention that section. We have every right to assume that in the 13 months passing between the service of the petition and the execution of the answer, the defendant examined the claims for refund and the petition.

We most urgently insist that not only has the defendant failed to show any equitable grounds why it should be permitted now to amend its answer, but if the amended answer is permitted an
151 injustice will be done plaintiff. The defendant has consistently claimed that plaintiff is not entitled to recover upon the merits. Now that its viewpoint has changed and it admits that plaintiff is entitled to recover upon the merits, it wishes to defeat plaintiff at any cost by setting up a technical defense, which it has always known and which would prevent a trial of the merits of the case.

It is therefore respectfully requested that the motion of the defendant be denied.

WILLIAM P. JEFFERY.

Sworn to before me this day of February, 1930.

LILLIAN M. WINANS,
Notary Public, N. Y. County.

Clerk's No. 200, reg. No. 0-47.
Commission expires March 30th, 1930.

152 In United States District Court

[Title omitted.]

Order allowing filing of amended answer

Feb. 26, 1930

A motion having been regularly made by the above-entitled defendant, by way of order to show cause, in order that the above-entitled defendant be permitted to serve an amended answer to the complaint herein, on the ground that the answer as originally filed does not correctly state the facts, and the matter having come on to be heard before this court on the 7th day of February, 1930,

Now, after reading the complaint herein, the answer to the complaint, verified the 19th day of October, 1928, and the proposed amended answer to the complaint, verified the 25th day of
153 February, 1930, and after hearing Jeffery & Redmond, by Joseph F. Murray, of counsel for the plaintiff, in opposition to said motion, and Charles H. Tuttle, United States attorney for the Southern District of New York, by Leon E. Spencer, assistant United States attorney, in support of said motion, and due deliberation having been had, it is hereby

Ordered that the United States of America, defendant, be permitted to file an amended answer to the complaint herein.

ALFRED C. COXE, *U. S. D. J.*

Filed Febry. 27/30.

154 In United States District Court

[Title omitted.]

Petitioner's petition for and order allowing appeal

To the Honorable the Judges of the United States District Court for the Southern District of New York:

Henry Prentiss & Company, Inc., the above-named petitioner, feeling itself aggrieved by a judgment made and entered herein on February 20, 1931, in the sum of $7,975.21, together with interest on

said sum from August 1, 1921, in favor of petitioner and against the defendant, does hereby appeal from said judgment to the United States Circuit Court of Appeals for the Second Circuit, for the reasons specified in the assignment of errors which is filed herewith, and prays for an order allowing it to prosecute said appeal, and to bring up for review upon such appeal the order dated February 26, 1930, and entered in the office of the clerk of this court on February 27, 1930, granting defendant's motion to file an amended
155 answer herein, and that a transcript of record and the papers and proceedings upon which the said order was made may be duly authenticated and sent to the Circuit Court of Appeals for the Second Circuit and that a citation be issued, as provided by law.

Dated, New York, May 15, 1931.

JEFFERY & REDMOND,
Attorneys for Petitioner.

Office & post-office address, 14 Wall Street, Borough of Manhattan, city of New York.

It is ordered that the appeal, as above prayed for, be allowed.

Dated, New York, May 15, 1931.

JNO. C. KNOX, *U. S. D. J.*

156 In United States District Court

[Title omitted.]

Assignment of errors

The petitioner, Henry Prentiss & Company, Inc., for its assignment of errors, respectfully alleges that:

1. The court erred in sustaining the objection of the defendant to the following question asked of the witness Jeffery:

"Q. Will you state what conversation was had between you and Mr. Lansforth at that time?"

2. The court erred in sustaining the objection of the defendant to any testimony of conversations between the witness Jeffery and Lansforth.

3. The court erred in making the findings of fact numbered VI and XXII at the request of the defendant, in that there was no evidence to support either of said findings.

4. The court erred in refusing to find as facts petitioner's proposed findings of fact numbered 17, 18, 19, and 26.

157 5. The court erred in holding as a matter of law that the petitioner's claim for refund seeking the recovery of 1918 income and profits taxes does not support in any wise the present suit, being defendant's conclusion of law No. 1, upon the ground that it is contrary to and against the evidence, and that the said claim for refund was in conformity with the statutes of the United States and the regulations of the Secretary of the Treasury, and that, if it was not, its sufficiency was waived by the defendant.

6. The court erred in refusing to make the conclusions of law requested by petitioner numbered 7, 8, 9, 10, 11, 12, 13, 15, and 16.

7. The court erred in granting the motion of defendant to serve an amended answer, and in making the order to that effect dated February 26, 1930, which was entered and filed February 27, 1930.

8. The court erred in not directing judgment in favor of plaintiff for the additional sum of $12,102.95 on account of taxes paid by it for the year 1918 in excess of the amount legally assessable against petitioner for said year, and in directing judgment in favor of the defendant on that issue.

Dated, New York, May 15, 1931.

JEFFERY & REDMOND,
Attorneys for Petitioner.

Office and post-office address, 14 Wall Street, Borough of Manhattan, New York City.

158 [Citation in usual form omitted in printing.]

159 In United States District Court

[Title omitted.]

Defendant's petition for appeal and order allowing same

To the Honorable the Judges of the United States District Court for the Southern District of New York:

United States of America, the defendant herein, by its counsel, now comes and says that on the 20th day of February, 1931, this court signed and entered its judgment in favor of the plaintiff in the sum of $7,975.21, with interest, in which judgment and proceedings had prior thereto in said cause certain errors were committed to the prejudice of the defendant, all of which more fully appear from the assignments of error filed herewith.

Wherefore, United States of America prays that an appeal may issue in its behalf to the United States Circuit Court of Appeals for the Second Circuit, for the correction of the errors so complained of and that a transcript of the record, proceedings, and papers in
160 said cause, duly authenticated, may be transmitted forthwith to the United States Circuit Court of Appeals for the Second Circuit in accordance with the laws of the United States and that a citation be issued, as provided by law.

Dated, New York, N. Y., May 19, 1931.

GEORGE Z. MEDALIE,
United States Attorney for the Southern District of New York,
Attorney for Defendant.

Office and P. O. address, U. S. Courts and P. O. Bldg., Borough of Manhattan, city of New York.

It is ordered that the appeal as above prayed for be, and the same hereby is, allowed.

Dated, New York, N. Y., May 19, 1931.

WOOLSEY, *U. S. D. J.*

161 In United States District Court

[Title omitted.]

Defendant's assignments of error

United States of America, defendant, by its counsel, now comes and in connection with its petition for appeal files the following assignments of error, on which it will rely on its appeal to the United States Circuit Court of Appeals for the Second Circuit from the final judgment of the District Court entered on February 20, 1931.

First. The court erred in deciding the issues and giving judgment in favor of the plaintiff on the ground that the plaintiff was entitled to include in its invsted capital for income and excess-profits tax purposes, for the years 1918 and 1920, an amount of $107,000 as a value for intangibles.

Second. The court erred in deciding the issues and giving judgment in favor of the plaintiff for $7,975.21 on the ground that the plaintiff's claim for refund seeking the recovery of 1920 income
162 and profits taxes was duly filed as provided by section 1112 of the revenue act of 1926 (section 3228 of the Revised Statutes as amended).

Third. The court erred in deciding the issues and giving judgment in favor of the plaintiff for $7,975.21 on the ground that the "waiver" filed by the plaintiff on May 5, 1926, respecting income and excess-profits taxes due for 1920, extended the time within which the plaintiff could file a claim for refund for the return of 1920 income and excess-profits taxes.

Fourth. The court erred in deciding the issues and giving judgment in favor of the plaintiff on the ground at the time of the organization of the plaintiff any intangible property was bona fide paid in for any stock of the plaintiff.

Wherefore, the defendant prays that the judgment in favor of the plaintiff for $7,975.21 of the United States District Court for the Southern District of New York in this action be reversed.

GEORGE Z. MEDALIE,
Attorney for Defendant,
United States Attorney,
Southern District of New York.

Office and P. O. address, U. S. Courts & P. O. Bldg., Borough of Manhattan, city of New York.

163 [Citation in usual form omitted in printing.]

164 In United States District Court

[Title omitted.]

Stipulation as to transcript of record

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated, January 8th, 1932.

JEFFERY & REDMOND,
Attorneys for Petitioner-Appellant and Appellee.

GEORGE Z. MEDALIE,
U. S. Attorney,
Attorney for Defendant-Appellant and Appellee.

165 [Clerk's certificate to foregoing transcript omitted in printing.]

166 In United States Circuit Court of Appeals for the Second Circuit

No. 318, October term, 1931

Argued March 17, 1932. Decided April 11, 1932

HENRY PRENTISS & COMPANY, INC., PLAINTIFF-APPELLANT AND appellee

v.

THE UNITED STATES OF AMERICA, DEFENDANT-APPELLANT AND APPELLEE

Appeal from the District Court of the United States for the Southern District of New York

Action to recover taxes illegally assessed for the calendar years 1918 and 1920. Judgment for the plaintiff for part of the amount sought to be recovered. Both plaintiff and defendant appeal. Judgment reversed and remanded.

Jeffery & Redmond, of New York City (Joseph F. Murray and William P. Jeffery, both of New York City, of counsel), for plaintiff.

George Z. Medalie, U. S. atty., and Leon E. Spencer, asst. U. S. atty., both of New York City.

Opinion

Before MANTON, L. HAND, and SWAN, Circuit Judges

MANTON, Circuit Judge.

Plaintiff in this action seeks recovery for taxes overpaid in 1918 and 1920. It paid income and profits taxes for 1918 on a return to be due in the sum of $535,144.20. An additional assessment was

paid in the amount of $119,191.19. For 1920 its income and excess profits were computed on a return to be due in the sum of $92,265.40. Plaintiff's contention is that the 1918 and 1920 taxes have been overpaid in the respective sums of $12,102.95 and $7,975.21, as a result of the commissioner's failure to allow in each year a sufficient sum for invested capital. It is argued that the plaintiff should have been allowed in each year an increase of invested capital of $153,871.08. Of this sum, $46,371.08 represented an additional value for real estate, and $107,500 a value for intangibles, such as good will. Below, the plaintiff was denied any amount for the calendar year 1918 because of the insufficiency of the claim for refund filed for that period. For 1920 the court granted a recovery in the sum of $7,975.21. By stipulation the real estate is valued at $81,000 as of September 1, 1916. The defendant urges that the allowance for intangibles is not justified as a matter of law.

The plaintiff was organized in August, 1916, with an authorized capital stock of $10,000, which was issued to the Prentiss Tool & Supply Company, its predecessor in title. On the day after this stock was issued it was increased from $10,000 to $500,000 par value, and the 4,900 new shares were issued to the original stockholders. Thereupon all the property was transferred to the plaintiff. The stock, pursuant to a resolution therefor, was distributed pro rata to the stockholders of the old company, and the property passed from the old company to the plaintiff, so that the stockholders had the same interest as before. The closing balance sheet of the old company and the opening one of the new showed the same assets and identical items of capital and liability, except that the capital stock of the Prentiss Tool & Supply Company was $25,000 and the surplus $913,894.35, whereas the plaintiff's stock was shown as $500,000 and the surplus as $438,894.35. Neither balance sheet included any value for good will, and no such item was carried on the books of
167 either company. The capital and surplus immediately before and after this transaction was the same total sum.

Section 326 (a) of the revenue act of 1918 (40 Stat. 1092) provides, in the calculation of taxes, that in determining invested capital for any calendar year the taxpayer is entitled to include as such any amount representing a value for intangibles or good will if it represents, (a) an actual cash sum, paid in for stocks or shares; (b) the par value of the stock or shares issued therefor, or (c) in the aggregate 25% of the par value of the total stock or shares of the corporation outstanding on March 3, 1917, whichever is lowest. And section 327 (40 Stat. 1093) provides for the determination where the commissioner is unable to determine invested capital as provided in section 326. But section 327 requires a specific allocation as to shares issued for tangible and intangible property. From the balance sheet and this record it is very evident that no shares were issued by the Prentiss Tool & Supply Company or this taxpayer for intangible property. For taxation purposes, there may be no "write-

up" to increase invested capital. Here the plaintiff issued all its capital stock in the sum of $500,000 to the old company in exchange for its assets. The resolution of the old company provided that the stock be acquired from the plaintiff and distributed pro rata among its stockholders. There was no item for good will. The plaintiff received in exchange for its capital stock all the business property previously owned by the Prentiss Tool & Supply Company, but the capital stock was issued for the assets as they were then fixed and valued, as the financial statement indicated. While it is true that the plaintiff is a separate corporate entity and may have acquired the property of its predecessor at a value corresponding to the property's true value, it is also a fact that the Prentiss Tool & Supply Company in the resolution of its board of directors, August 25, 1916, wherein the transfers were provided for, offered to accept $490,000 par value of the stock in lieu of cash. At this time, apparently, there was no intention to write up an increased invested capital. The value was fixed by the financial statement and there no value was allocated to good will. We must conclude that the plaintiff issued capital stock for the property as it then stood. The good will followed the property and was no part of the consideration for which the stock was issued to the plaintiff. Good will is excluded unless it has been secured at a cost. (Red Wing Malting Co. v. Willcuts, 15 F. (2d) 626, 49 A. L. R. 459 (C. C. A. 8).)

In La Belle Iron Works v. United States (256 U. S. 377, 41 S. Ct. 528, 65 L. Ed. 998) the taxpayer acquired ore lands for which it paid the sum of $190,000 prior to 1904. The property appreciated so that during the period from 1912 to 1917 its actual value was upwards of $10,000,000. In 1912 the company increased the value of the ore lands on its books by adding thereto $10,000,000, which it carried as surplus, and during the same year it declared a stock dividend of $9,915,400. Theretofore its capital stock consisted of shares having a par value of $9,915,400. The stock dividend was accomplished by retiring its own stock and issuing one share of preferred and one share of common for each share retired. In its income-tax return for the calendar year 1917 it valued its invested capital at $26,322,-904.14, which included the write-up figure of $10,105,400. The commissioner reduced the company's invested capital to $16,407,507.14. The court held that invested capital was restricted to actual money, or its worth, expended. Cash and intangible property paid in are confined to such as were contributed for stock in the corporation. The taxing statute may not be construed as including within the definition of invested capital any marking up of the valuation of the assets upon the books to correspond with the increase in market value, or any paper transaction by which the new shares were issued in exchange for the old ones in the same corporation, but which were not in substance and effect a new acquisition of capital property by the company. (Hotel Wisconsin Realty Co. v. Comr., 47 F. (2d) 842 (C. C. A. 7); Golden Cycle Corp. v. Comr., 51 F. (2d) 927

(C. C. A. 10).) It is apparent that to include good will as invested capital the stock of the company must be specifically issued for the intangibles. It is not enough to issue it for the property generally which was taken over. Good will is an incident to the business of any going concern and may follow it and not be paid in for the stock of the acquiring company. (Lewis A. Crossett Co. v. United States, 50 F.(2d) 292 (Ct. Cl.); Landesman-Hirschheimer Co. v. Comr., 44 F. (2d) 521 (C. C. A. 6).)

168 The defendant does not dispute the undervaluation of the real estate. The claim filed for refund of taxes paid for the calendar year 1918 is disputed because of its insufficiency and inadequacy to support this claim for additional invested capital by reason of such undervaluation. The plaintiff, in its claim for refund asked for its allowance, stating that "it is entitled to relief under sections 327, 328 of the 1918 act." The relief to be granted under these sections concededly is not similar to that which is now sought in this suit. Section 1113 of the revenue act of 1926 (44 Stat. 116, now section 3226 of the Revised Statutes, as amended [26 U. S. C. A., § 156]) requires that the claim which is presented must be stated in the application to the commissioner, and the taxpayer can not base a recovery in the court upon an entirely different and distinct ground from that presented to the commisioner. (United States v. Felt & Tarrant Mfg. Co., 283 U. S. 269, 51 S. Ct. 376, 75 L. ed. 1025; Lewis A. Crossett Co. v. United States, 50 F. (2d) 292 (Ct. Cl.).) The claim for refund made no reference to undervaluation of real estate and no reference was made to it until after the claim was rejected by letter of July 16, 1925. However, the commissioner's action did not appear on the rejection schedule until September 3, 1926. On April 12, 1926, the plaintiff filed an additional brief which is in effect an amended claim. Its first brief had been filed before rejection. There was a reconsideration by the commissioner of the claim after rejection, and it was then urged that there had been an undervaluation of real estate which should have been taken into consideration in determining invested capital. This was sufficient upon which to base a claim under section 326 as to the allowance for real-estate increases. This claim was reconsidered and disallowed. It was sufficient to advise the commissioner while the claim was under consideration of the reasons the plaintiff put forth then and now for its allowance.

The claims for undervaluation of the real estate will be allowed and the claims for intangibles disallowed. It follows that the judgment below will be reversed, with directions to the District Court to enter a judgment allowing recovery for both 1918 and 1920 taxes to the extent of the undervaluation of the real estate which resulted in an excess payment; the claims for allowance for intangibles are disallowed.

Judgment reversed, with directions to enter a judgment in conformity with this opinion.

169 In United States Circuit Court of Appeals Second Circuit

HENRY PRENTISS & CO., INC., PLAINTIFF-APPELLANT

vs.

THE UNITED STATES, DEFENDANT-APPELLANT

Judgment

Filed April 18, 1932

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be, and it hereby is, reversed with directions to enter a judgment in conformity with the opinion of this court.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

WM. PARKIN, *Clerk.*

170 [File endorsement omitted.]

171 [Clerk's certificate to foregoing transcript omitted in printing.]

172 Supreme Court of the United States

Order allowing certiorari

Filed October 10, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is assigned for argument immediately following case No. 141, United States vs. Factors & Finance Co.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though fied in response to such writ.

[Indorsement on cover:] File No. 36931. U. S. Circuit Court of Appeals Second Circuit. Term No. 234. The United States of America, petitioner, vs. Henry Prentiss & Company, Inc. Petition for a writ of certiorari and exhibits thereto. Filed July 18, 1932. File No. 36931.

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